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IN THE

Supreme Court of the United States

October Term 1952

No. 484

OKLAHOMA CONTRACTING COMPANY, INC., *Petitioner,*

vs.

MAGNOLIA PIPE LINE COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

October Term 1952

No. .....

Oklahoma Contracting Company, Inc., *Petitioner,*

vs.

Magnolia Pipe Line Company, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, Oklahoma Contracting Company, Inc., (hereinafter referred to as Oklahoma) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 22, 1952, and an order entered September 10, 1952, denying a motion for rehearing including a showing of newly discovered and material evidence.

OPINIONS BELOW

An unreported memorandum opinion of the Trial Court filed February 14, 1950, is in the record (R. 455) along with its judgment and findings of fact filed February 20, 1950. (R. 468-474). The opinion of the Circuit Court of Appeals was filed March 22, 1952. It has been reported in 195 Fed (2d) 391 and is in the record. (R. 993-1002).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code to review the judgment entered March 22, 1952, by the United States Court of Appeals for the Fifth Circuit and its order filed Sep-

tember 10, 1952, denying the second motion for rehearing including a showing of newly discovered and material evidence. (R. 1030)

QUESTIONS PRESENTED

Questions presented by this case for the purpose of determining whether certiorari should be granted are contained herein in paragraphs numbered from 1 to 4, inclusive, under the heading: "Reasons for Granting the Writ" (Post 20). Questions presented on the merits of the case are contained herein in paragraphs numbered from 1 to 6 under the heading: "Specifications of Errors to be Urged" (Post 18).

STATEMENT

The Magnolia Pipe Line Company, (hereinafter referred to as Magnolia), an interstate carrier for hire of crude oil (R. 984-985), determined upon the construction of approximately 650 miles of pipe line (R. 502), from Corsicana, Texas, to Patoka, Illinois (R. 498). A "corrected" order dated June 27, 1946, was placed by Magnolia with the Continental Supply Company for approximately 369 miles of 20″ OD 5/16″ steel pipe, "shipping instructions to be given later" (R. 923-925) and a second "corrected" order dated July 5, 1946 was placed by Magnolia with the National Tube Company for several quantities and sizes of pipe, including 244 miles of 20″ OD 5/16″ pipe with "shipping instructions to be given later" (R. 926-928). Shipping orders were given from time to time for comparatively small quantities of the pipe (R. 926-971) and Magnolia produced no evidence that there were delays by the pipe supplier as to any of these shipping orders.

Magnolia divided the 650 miles between Corsicana and Patoka into six separate sections of varying lengths for the purpose of letting the contracts for the installation of the pipe line (R. 511). These six contracts were each

primarily labor contracts, since Magnolia was to furnish the steel pipe and all other materials except welding rods. Oklahoma placed on the job construction equipment costing over one million dollars (R. 451). Separate contracts for river crossings were also let but they are not in issue here.

Oklahoma was awarded four of the construction contracts for Sections 1, 4, 5 and 6.* While they bear separate dates in April 1947, it was stipulated on the record that all four were executed April 30, 1947 (R. 256). The four contracts to Oklahoma included the entire pipe line, from Corsicana, Texas, to Patoka, Illinois, exclusive of the river crossings, and except Sections 2 and 3 aggregating 219.08 miles from the junction near Winfield, Texas, to the junction near Conway, Arkansas. Sections 2 and 3 were let to Eastern Construction Company and H. C. Price Company, respectively. Section 1 let to Oklahoma extended from Corsicana to near Winnfield, Texas. Sections 4, 5 and 6, were numbered from the Patoka end of the pipeline and extended

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* The circumstances of the letting of these four contracts to Oklahoma were as follows:

Oklahoma submitted its sealed bids on each of the six sections on April 23, 1947 (R. 973). After the bids were submitted, Magnolia invited Oklahoma into private negotiations, and proposed to Oklahoma that if Oklahoma would reduce its bids 20 cents per lineal foot on Section 5, and 25 cents per lineal foot on Section 6, Magnolia would award Oklahoma contracts for the construction of Sections 1, 4, 5 and 6 (R. 798; 804). Oklahoma had three "spreads" of machinery, equipment and personnel (R. 385), hereinafter referred to as "gangs". Oklahoma informed Magnolia that, to avoid any great degree of winter weather construction, if Oklahoma's Section 1 gang could move immediately to Section 6, upon the completion of Section 1, and its Section 4 gang could move immediately to Section 5, upon the completion of Section 4, Oklahoma would reduce its bids 20 cents per foot on Section 5, and 25 cents per foot on Section 6. (A reduction of more than $250,000.00) Magnolia assured Oklahoma that the pipe deliveries would be materially increased on Sections 5 and 6 "to where that would be possible". (R. 356-359; 381-382). Oklahoma's third gang was to be in reserve, and was to be used "if and when needed". (R. 385-386). Oklahoma reduced its bids accordingly.

from Patoka to the junction near Conway, Arkansas. (R. 511).

A diagram showing both the entire route and the several sections is contained in the record (R. 777).

All four of these contracts for the separate sections that Oklahoma was required to construct are in the record (R. 722, 791, 796, 802 and 807). However, only the specifications for Section 1 are in the record. (R. 727-779). The specifications attached to the contracts for Sections 4, 5 and 6 have been omitted from the record. The specifications for the several sections were identical and prepared in their entirety by Magnolia (R. 971-972).

Each of these four contracts defines the Magnolia Pipe Line Company as the "Company" and the Oklahoma Contracting Company, Inc., as the "Contractor". (R. 722, 791, 802, 807). Each of the contracts similarly contains an Article 4 as follows:

> "4. It is further understood and agreed that Contractor shall have *no claim of any character whatsoever for damages for delay or work stoppage due to failure of pipe supplier to deliver pipe to Company according to the present schedule of delivery or if Company is unable to furnish the materials as needed for any other reason beyond its control.*" (R. 725, 794, 799, 805). (Italics supplied)

The specifications, under the heading, "Materials Company Shall Furnish", provided that:

> "The Company will furnish all pipe, casing, primer, doping materials, wrappers, gate valves, fittings, vent pipe and other materials to be used in the construction of said pipe line, excepting welding rods.
>
> "*Company will deliver all such pipe and other materials, which are to become a part of said line* f.o.b. cars at Railroad Stations, Pump Stations, or Railroad sidings advantageously located near the right of way. Company will accept for its consideration Contractor's recommendation as to shipping points for the delivery of all materials. Contractor will at the time his bid is submitted, file his suggestions

as to the shipping points and the amounts to each respective point.

"As soon as Company receives shipping notices on materials, Company will in turn notify Contractor. (R. 749-750).

• • • •

"Present schedule of delivery of pipe as furnished by pipe supplier is as set out below and the deliveries applicable to each section is as indicated:" (Italics supplied)

Here follows a tabulation in the record (R. 750-751) which is also quoted in the opinion of the Court of Appeals below. (R. 995-996)

The contract specifications further provided under the heading of "Time for Starting and Completing Work" that:

"It is agreed that the starting date for either of Sections 1 to 6 inclusive shall be five days after the date on which the Company notifies the Contractor that sufficient pipe will be delivered f.o.b. Railroad Station nearest to the point where work is to begin to complete five miles of line, and starting date for section 7 shall be five days from the date when Company shall notify contractor that sufficient pipe will be on hand for the completion of any one of four river crossings. The completion date as referred to in this paragraph, that is, the date on which the contractor actually completes the line, shall be the date on which all work has been completed to the satisfaction of the Company Inspector and the line can be placed in service without damage thereto, and Contractor agrees to complete said work with due diligence and within 150 calendar days for Section 1; 150 calendar days for Section 2; 150 calendar days for Section 3; 100 calendar days for Section 4; 150 calendar days for Section 5; 150 calendar days for Section 6; 90 calendar days for Mississippi River; 60 calendar days for White River; 60 calendar days for Arkansas River; and 60 calendar days for Red River

from said starting date for each of sections 1 to 7 inclusive." (R. 775).

The next succeeding paragraph of the specifications provided that in event of the failure of the contractor to furnish ample facilities and labor to complete the line within the time set forth in the specifications Magnolia should have the right to secure such necessary facilities and labor to insure completion by the contract completion date and charge any excess costs to the contractor. (R. 776). Thus contemplating that for any delays of the contractor actual damages, measured by the excess costs of construction, would be charged to the contractor.

The third and concluding paragraph in the specifications under this heading: "Time for Starting and Completing Work", is as follows:

> "It is understood, however, that in view of the uncertainty of the delivery of the pipe and materials going into this work, *in the event the Company is unable to furnish materials as needed for any reason beyond the control of Company,* then such time shall be *deducted* from such period and Company shall not be liable for damages for any such delay. The schedule for the delivery of the pipe by suppliers submitted for bids is as indicated in Section IV of these specifications entitled "Materials Company shall Furnish. (R. 776) (Italics supplied).

Oklahoma commenced construction of Section 1 of the pipe line on June 2, 1947, and duly completed the same on or about August 15, 1947 (R. 360). Oklahoma had moved a second crew and equipment to Section 4 on or about July 29, 1947. Insufficient pipe, approximately 16 miles, had been furnished by Magnolia for the completion of Section 4, consisting of approximately 73.54 miles from Patoka to the Mississippi River crossing and none had been furnished by Magnolia for Sections 5 and 6.

There previously had been approximately 100 miles of pipe delivered at railheads on Sections 2 and 3 of the pipe line and Oklahoma requested in August and September 1947, that a part of said pipe be removed to Sections 4, 5 and 6 so it could finish Section 4 and commence construction operations on Sections 5 and 6 of the line. Magnolia refused to do so.

Oklahoma had to shut down work on Section 4 on September 23, 1947, for lack of pipe, although all pipe for this section should have been completely furnished by that time. (R. 751). No pipe had been furnished by Magnolia for use on Sections 5 in September and for use on Section 6 in October 1947 (R. 751). The failure of Magnolia in this respect to furnish Oklahoma pipe as needed was not due to any failure of the pipe suppliers to deliver pipe to Magnolia in accordance with the schedule. On the contrary, as hereinafter shown (Post 8, 24-26), Magnolia received delivery of 40 miles of pipe from its supplier in August 1947, and diverted the entire quantity in August and September 1947, to the Humble Pipe Line Company instead of furnishing same to in part supply the needs of Oklahoma on Sections 4, 5 and 6, extending from Conway, Arkansas, to Patoka, Illinois. Also, Magnolia had "bunched", or overdelivered by July 27, 1947 (R. 875-878) to Section 2 and by July 22, 1947 (R. 879-886) on Section 3 of the pipe line approximately 100 miles of pipe in excess of the needs of the two contractors on said sections (Post, 11, footnote 2).

Conflicting positions of Magnolia and Oklahoma were set forth in the opinion of the Court of Appeals below as follows:

> "Oklahoma contends that this shutdown projected the time of work on Section 5 and 6 into the period of winter weather with consequent construction difficulties at increased costs which damaged it in the amount sued for. In the present litigation the main point at issue between the parties is the proper con-

> struction of the contracts referred to. The question really arises from the contention of Oklahoma that, at the time it was forced to cease operations there was approximately 100 miles of pipe located at the railheads near and on Sections 2 and 3 which were not then necessary for those operations, that Magnolia should have granted its request that the pipe be moved to Section 4 so it could proceed there and that pipe thus delivered could have been replaced with pipe later obtainable under order for Section 4. Magnolia contends that in accordance with the specifications and contract the pipe had been delivered to the contractors on Sections 2 and 3 in accordance with schedule and thus could not be removed, since it was not known when it could be replaced and if it were removed Magnolia would be liable to contractors on those Sections for any damages caused by delay. Oklahoma vigorously asserts that the contract recognizes a clear difference between the pipe delivery schedule from the 'pipe supplier to Magnolia', and the contractural obligation of Magnolia to furnish Oklahoma with pipe, as needed, after Magnolia received the pipe from the pipe supplier." (R. 947).

Subsequent to the court's opinion, newly discovered evidence showed that Magnolia had actually received from its pipe suppliers in August 1947, 40 miles of the required pipe, which Magnolia diverted during the months of August and September 1947, to the Humble Pipe Line Company to enable it to construct a different pipe line which was placed in operation in November 1947. (R. 1029-1030). Post, pages 24-26.

If such newly discovered evidence be true, Magnolia had not only failed and refused to transfer any part of the 100 miles of unused and unneeded pipe at that time on Sections 2 and 3 to Oklahoma's operations on Sections 4, 5 and 6 where such pipe was needed, but Magnolia diverted 40 miles of additional pipe to another pipe-line company when it was badly needed by Oklahoma and in violation of Magnolia's contracts with Oklahoma to furnish pipe as needed by Oklahoma.

These 40 miles of 20" O.D. steel pipe had been delivered to Magnolia by the Youngstown Sheet and Tube Company, one of the two suppliers of such pipe for use in the Magnolia Pipe-line. This evidence had been suppressed at the trial by Magnolia's representatives. Also, the record thereof was not furnished to counsel for Oklahoma among the other records of orders and shipments of pipe to Magnolia in accordance with such counsel's demand for the production of these records placed in evidence by Magnolia's counsel. (R. 351-353).

Counsel for Oklahoma promptly brought the newly discovered evidence to the attention of the Court of Appeals because the failure to produce the record showing the diversion of the 40 miles of pipe, worked a fraud on both the trial court and Oklahoma.

Magnolia did not even contest the second motion to the Court of Appeals for a new trial based in part on the newly discovered evidence or make any denial that it had diverted in August and September 1947, the 40 miles of pipe delivered by its suppliers in August 1947.

On the contrary, it was claimed by Vice President and General Manager True of Magnolia that a principal reason for the refusal of Magnolia to cause some of the pipe delivered for Sections 2 and 3 to be transferred for installation on Sections 4, 5 and 6 was the desire of Magnolia to complete the line from Corsicana to Conway so that Magnolia could commence the movement of crude oil from Corsicana to Conway in the pipe-line to be there transhipped via tank cars to points East (R. 682-684, 689-692). Mr. True thus testified:

> "Bill, this is on the record—had Magnolia Pipe Line Company transferred 16 miles of pipe from either Sections 2 or 3 or from both, at the time Oklahoma Contracting Company requested it, I would have been taking a big gamble on receiving pipe from the mill. The mills were having labor troubles, and we were scared that they would be shut down at

any time. Had I transferred that pipe and the strike had gone on, which we didn't know whether they would go on or be settled, *we would have had a gap in our line between Corsicana and Conway, Arkansas, and it would not have been completed in time to start shipping oil east as early as we did.*". R. 683).

General Manager and Vice President True further testified that:

"Another reason, that we wanted to complete in 1947 and put into operation as much of this line as we could, in order to get in our evaluation; in other words, if we could complete, in 1947, as much of this line as we could, we could render that in 1947 as in operation, and we would be allowed on that valuation to earn seven per cent". (R. 227).

Upon direct examination by Magnolia's Counsel, Mr. True further testified that Magnolia was under the United States Antitrust Consent Decree [1] and that:

"Q. Without going into the uncertainties of that decree, or the exact wording, one phase of that judgment is the seven per cent limitation on the amount you may pay your stockholders?

"A. That is true.

"Q. The excess of that is in some frozen account?

"A. That is right.

"Q. And that valuation for the Consent Decree purposes, ordinarily applies to lines in operation, is that right?

"A. That is right.

"Q. Was your objectives in putting 1, 2 and 3 into Conway, to get as much of that line in operation on the 31st of December, 1947, as possible?

"A. Yes, sir, that was." (R. 229) Compare his testimony at R.691-692.

The pipe line from Corsicana to Conway was completed about December 24, 1947 (R. 300). By December 31, 1947, Magnolia had run 4,266.62 barrels of crude oil through

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[1] Pertinent provisions of this consent decree entered December 23, 1941, are in the record (R. 21-24).

the line which was shipped out of Conway by tank cars, the only way it then could be shipped (R. 979). On the basis of having the line in use from Corsicana to Conway, even though a mere driblet of crude oil went through the line to December 31, 1947, Magnolia was enabled under the consent decree to pay a dividend to its stockholders equal to 7 percentum of the cost of the pipe line from Corsicana to Conway (R. 302). Transhipment of crude oil at Conway via tank cars was abandoned in June 1948 (R. 305). But by the small use of the line from Corsicana to Conway in 1947 Magnolia stockholders could have received in increased dividends some One Million Dollars (R. 386-387), even though Oklahoma has alleged it incurred a loss in excess of one million dollars through the failure of Magnolia to furnish pipe as needed by Oklahoma on Sections 4, 5 and 6 of the pipe line (R. 196), and because Magnolia furnished approximately 100 miles of pipe in excess of current needs of the contractors on Sections 2 and 3, which excess Magnolia denied to Oklahoma currently needing the same on Sections 4, 5 and 6.

Not only was Magnolia reserving the 100 miles of pipe not then needed in August and September 1947 by the contractors on Sections 2 and 3 of the line, and considerable parts of which were not used until many weeks thereafter (R. 877-878, sec. 2 of 883-886, Sec. 3), so as to drive the line through to Conway regardless in order to take advantage of the Consent Decree and increase the dividends payable to stockholders by placing that segment of the line in operation before December 31, 1947,[2] but wholly unknown to Oklahoma, until after this suit had

[2] In fact, as late as November 25, 1947, the contractor for Section 3 of the line, extending from Muphreesboro, Arkansas, to Conway, Arkansas (R. 511) had not completed the line (R. 844-845) and Magnolia induced Oklahoma to commence construction of this line at the southern end and move northward to a junction with the other contractor (R. 847-851) in order to get this segment of the pipe line in operation and qualify for the increased dividends by December 31, 1947.

been tried in the District Court and had been decided on appeal in the Court of Appeals, Magnolia had diverted to the Humble Pipe Line Company in August and September 1947, some 40 miles of the identical pipe delivered to Magnolia by the Youngstown Sheet and Tube Company (R. 24-25).

During the shutdown, from September 23rd to October 16, 1947, (22 days), the weather and construction conditions were excellent (R. 410-412). Pipe arrived the night of October 15, 1947 (R. 410). The weather continued good for about nine days, and on or about October 25, 1947, rain and bad weather came, and continued to the end of the job (R. 288-299; 412). Section 4 was completed on or about November 20, 1947, (R. 408-412). The difference between the actual cost of per lineal foot construction for the last 16 miles, and what it would have cost, if Magnolia had furnished pipe as needed, was $147,546.00 (R. 426-427; 988). The evidence of these damages is uncontroverted in the record.

The delay resulting to Oklahoma on Section 4 forced a delay in starting construction of Section 5, in Missouri, with the Section 4 gang. After the completion of Section 4, on or about November 20, 1947, the Section 4 gang moved across the Mississippi, on or about November 21, 1947, and commenced construction of Section 5 (R. 412). Bad weather and construction conditions continued throughout the construction of this section, which was not completed until on or about May 18, 1948 (R. 412). The difference between the actual cost of construction of this section and what it would have cost had Magnolia furnished available pipe as needed was $659,528.00 (R. 428; 988). The evidence of these damages is uncontroverted in the record.

Pipe arrived and the Section 1 gang moved to Section 6, in Arkansas, on or about November 23, 1947, to start construction of that section, when Magnolia prevailed upon Oklahoma to move this gang to Section 3 in Arkansas to help the Price Company complete that section (R. 138). The Section 1 gang was on Section 3 from November 27, 1947, until December 13, 1947 (R. 422). Construction of Section 6 began on or about December 18, 1947 (R. 422). Bad and winter weather prevailed (R. 402). This section was not completed until May 16, 1948 (R. 401-402). The difference between actual cost of construction of this section, and what it would have cost had Magnolia furnished pipe as needed, on or about September 1, 1947, was $705,975.00 (R. 428; 988). The evidence of these damages is uncontroverted in the record.

THE PLEADINGS AND PROCEEDINGS BELOW

A summarization of the pleadings and proceedings below may add to clarification of Petitioner's application to this Court.

After abortive attempts to reach a final amicable settlement of its damage claims, following the full and complete performance of its contracts for the construction of Sections 4, 5, and 6 (R. 146-151), Oklahoma instituted proceedings to perpetuate the testimony of L. H. True and George T. Jackson, officials of Magnolia, in the State District Court of Dallas County, Texas, on or about September 1, 1949 (R. 69-72; 130). Magnolia's legal department sought to enjoin these proceedings, but on September 14, 1949, after a hearing thereon, injunctive relief was denied, and the Court ordered the parties to proceed with the taking of the depositions (R. 130-131), which was set for September 27, 1949 (R. 131).

On September 19, 1949, Magnolia filed a paper in the United States District Court for the Northern District of

Texas, at Dallas, entitled "Complaint" purporting to allege a declaratory judgment action and containing therein a spurious claim for the recovery of money paid by Magnolia to Oklahoma under contract (R. 50-62).

At this point, it is to be noted that Magnolia Pipe Line Company is a Texas corporation with its principal office and place of business in Dallas, Dallas County, Texas. Oklahoma Contracting Company, Inc. is a Delaware corporation, with a permit to do business in the State of Texas, and having its principal office and place of business in Dallas, Dallas County, Texas (R. 50-51).

This Court is respectfully requested to examine Magnolia's "Complaint", particularly the jurisdiction allegations and the "declaratory-judgment" prayer (R. 50-62).

The $36,276.00 item in the "Complaint", (R. 54-55; 61 (b)), represented accrued percentage retainage withheld by Magnolia from per-lineal-foot construction earnings of Oklahoma as provided under its contracts for the construction of Sections 4, 5 and 6, (R. 769 (C); 754 (E)). This item was not litigated, and was distributed to the parties by their stipulation prior to trial (R. 472-473). No controversy in truth and in fact ever existed on this item. This is the identical item covered and referred to in Magnolia's letters of August 13, 1948, (R. 152-153), and October 29, 1948, (R. 154-155) in the amount of $37,894.71. Between those letters and the filing of Magnolia's "Complaint", some additional off-right-of-way damage claims had been received. Oklahoma had returned the $37,894.71 check to Magnolia each time (twice) for the same reason, as set forth in each letter of transmittal from Oklahoma; namely, such check did not "constitute payment in full for all of our claims on account of construction of the 20" Corsicana-Patoka oil line". (R. 153-154; 155-156).

The $268,274.50 item, set forth in the "Complaint", (R. 59(n); 61 (C)), was an item paid by Magnolia to Oklahoma under the provisions of Magnolia's letter agreement addressed to Oklahoma, dated April 5, 1948, (R. 870-871), which payment was made to Oklahoma, after Oklahoma had fully performed the agreement, as an "extra", as evidenced by Magnolia's voucher and correspondence records (R. 141-142; 976-977; 978).

Oklahoma's motions to dismiss the "Complaint", (R. 63-69; 117-127), in substance, alleged that State Court actions were pending; that the proceeding was instituted by Magnolia to select its forum and to circumvent the jurisdiction of the State Courts; that the proceeding sought to have adjudicated Magnolia's defenses to common law actions for damages already vested in Oklahoma; that the damage claims of Oklahoma were not the proper subject and not within the scope of the declaratory judgment Act, as amended; that Magnolia filed its "Complaint" with full knowledge that the institution by Oklahoma of its common law damage claims was imminent. Both sets of motions to dismiss were overruled. (R. 116; 159).

Oklahoma timely filed its demand for a jury, with written notice to opposing Counsel, and the case was placed on the jury docket (R. 157-158), after which, the Trial Court, "on its own motion ordered and directed that the case would be tried as a nonjury case, to which action and ruling of the Court defendant, Oklahoma Contracting Company, Inc., then and there objected and excepted." (R. 161).

Oklahoma timely filed a controverting affidavit to Magnolia's motion for summary judgment, which motion was overruled (R. 128-156; 159-161) along with its other motions.

Oklahoma timely filed an amended answer and cross action, subject to, and without waiving its motions to dismiss (R. 162), the substance of Oklahoma's pending cross action, for actual and exemplary damages, being, that Magnolia had contracted to furnish Oklahoma all pipe and other materials to be used in the construction of Magnolia's pipe line; that Oklahoma was compelled to experience work stoppages and delays during the construction of Section 4, as a direct and proximate result of Magnolia's arbitrary and wilful failure and refusal to furnish Oklahoma with available pipe on hand, required to construct its pipe line; that this work stoppage and delay forced Oklahoma into bad and expensive construction conditions; that the wilful and arbitrary failure and refusal of Magnolia to furnish Oklahoma with available pipe on hand delayed Oklahoma in starting its construction of Sections 5 and 6, thereby forcing Oklahoma into costly bad and winter weather construction conditions; that Magnolia arbitrarily and wilfully discriminated against Oklahoma in favor of Sections 2 and 3, so that Magnolia could reap big profits under the Consent Decree by completing Sections 2 and 3 in 1947; that all pipe and other materials, to be used in the construction of said line, were exclusively owned, and controlled by Magnolia at all times; that the acts and deeds of Magnolia were calculated, wilful, deliberate, arbitrary and wrongful, and in total and unconscionable disregard of Magnolia's contractual obligations to Oklahoma (R. 162-198).

The case went to trial February 13, 1950, before Judge Atwell, without a jury (R. 206). The Court gave an oral opinion February 14, 1950, in which he found against Magnolia on its claims, and concluded that Oklahoma was entitled to recover $11,314.18 for watering down pipe, as an "extra", but denied Oklahoma all other relief sought (R. 455-456). The Court filed its written findings of fact and conclusions of law on February 20, 1950 (R. 468-474).

Oklahoma seasonably filed its notice of appeal March 21, 1950 (R. 474-476), its bond (R. 477), and its statement of points on appeal, April 18, 1950 (R. 479-482).

Magnolia did not appeal, and promptly paid off the money judgment against it in the amount of $11,314.18. (R. 547-549).

Upon appeal, the Court of Appeals determined that the motion for a jury trial should not have been denied Oklahoma, in accordance with the Constitutional right given a litigant, but concluded that under the construction given the contract by the Court, a jury trial would have been futile (R. 1001-1002), even though "the importance of this right discloses the danger of any retrospective weighing of injury resulting from the improper denial of trial by jury".

The Court of Appeals found and held that "there would have been substantial merit in Oklahoma's claim that the matter was not one which the (Trial) Court should have entertained" (R. 1000-1001), however "the Court had jurisdiction of the claim for the recovery of the $268,000.00" item, even though the record is that no real justiciable issue was before the Court on this item. (R. 870-871; 976-977; 978; 141-142; 249-251).

The Court of Appeals found and held that under the terms of the contract, and "the undisputed facts", Magnolia was "not liable to Oklahoma for its damages sustained as a result of the delay in procuring pipe necessary to the construction of Section 4" • • • "due to failure of pipe supplier to deliver pipe to Magnolia", and "failure of delivery to it (Magnolia) by the suppliers as thus allotted to each section and that since it is undisputed that as to the sections involved in Oklahoma's contracts (Sections 4, 5 and 6) the pipe was not so supplied the delay is clearly within the terms of the contract excusing it from any liability for damages." This decision

of the Court of Appeals disregards and ignores two vital contract provisions:

> "*IV.* Materials Company Shall Furnish.
> "The Company shall furnish all pipe * * * and other materials to be used in the construction of said pipe line, excepting welding rods.
> "Company will deliver all such pipe and other materials, *which are to become a part of said line* * * *."

Likewise, the Court of Appeals has completely disregarded and ignored the newly discovered evidence relating to approximately 40 miles of identical pipe that was diverted and transferred by Magnolia to Humble Pipe Line Company, which pipe had been consigned and delivered to Magnolia by Youngstown Sheet and Tube Company, one of Magnolia's two pipe suppliers, in August and September or August or September, 1947, the identical period Oklahoma was compelled to shut down on Section 4, and was forced to delay the start of construction on Sections 5 and 6. (R. 1025-1030)

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In refusing to protect Oklahoma in its written demand, seasonably made to the trial court, in a suit at law for a jury trial as guaranteed in the VIIth Amendment to the Constitution of the United States and as provided in both the applicable Statutes of the United States and by Rule 38(a) and (b) of the Federal Rules of Civil Procedure prescribed by this Court for the District Courts of the United States, thereby depriving Oklahoma of due process of law as guaranteed in the Vth Amendment.

2. In refusing to hold that the complaint for a Declaratory Judgment sought to invoke an inappropriate procedure for the determination of the complex issues between Magnolia and Oklahoma and in refusing to hold that even

if such Declaratory Procedure be appropriate, the defendant Oklahoma was entitled to due process of law under the Vth Amendment and to a jury trial as demanded and as provided in the VIIth Amendment to the Constitution of the United States and as provided in Rule 57 of the Federal Rules of Civil Procedure.

3. In refusing to reverse the trial court and direct a new trial on the basis of the newly discovered and material evidence—presented by motion to the Court of Appeals under Rule 60(b) of the Federal Rules of Civil Procedure, on behalf of Oklahoma, and which evidence had been suppressed by Magnolia showing that it had transferred and diverted 40 miles of 20-inch pipe, identical with that being installed in the Magnolia pipeline, to another pipe line company at the identical time that Oklahoma was badly in need of additional pipe to continue pipeline construction for Magnolia. Thereby a fraud was worked by Magnolia, whether intentional or not, on both the trial court and Oklahoma.

4. In so construing and interpreting the contract between Magnolia and Oklahoma that the said Magnolia was permitted to contract against its own negligence, design and inaction in not furnishing enough pipe to enable Oklahoma to have pipe when needed for its construction operations for Magnolia and thereby enabling Magnolia to place the interests of its stockholders in increased dividends superior to the contract obligations of Magnolia to Oklahoma.

5. In refusing to hold that under the terms of the contracts between Magnolia and Oklahoma the former was responsible in damages to the latter when Oklahoma needed pipe and other materials with which to continue construction operations and Magnolia had received delivery of same from the pipe supplier but refused to furnish same to Oklahoma because Magnolia had unilaterally concluded to finish three consecutive sections of the pipe line so

that it could use the same and obtain the benefit of such use for purposes of increased dividends to its stockholders and because Magnolia elected to divert 40 miles of the pipe to another and separate pipe line company for its use.

6. In refusing to impose on Magnolia, an interstate carrier for hire, subject to regulation by the Interstate Commerce Commission, legal liability based on jury determined facts and the terms of Magnolia's contracts with Oklahoma for construction of its pipe lines, the costs of which, and the depreciation for which enter into the base of Magnolia for payment of dividends under the Consent Decree and in its rate base as well as in its depreciation base for the payment of corporate income taxes.

7. In affirming the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. *Oklahoma was denied its constitutional right to a jury trial and due process of law.*

Unquestionably the amounts involved exceeded $20.00; unquestionably a written demand was seasonably made for a jury trial; unquestionably the VIIth Amendment to the Constitution of the United States guarantees to Oklahoma an unqualified right to a jury trial; and unquestionably whether this complaint filed by Magnolia be considered a common law proceeding or a Declaratory Judgment proceeding both Rule 38(a) and (b) and Rule 57 of the Federal Rules of Civil Procedure require that in either event a jury trial be accorded to a plaintiff or defendant when demanded and there are issues of fact involved in a law or Declaratory Judgment proceeding.

It is unquestionably true that constitutional government either does not exist in the present day world or it is under attack to a more or less extent where it does exist. Among the dearest of constitutional rights of Americans

is the right of a trial by jury which the founders were unwilling to leave to the Constitution as written in Philadelphia but insisted upon a specific guarantee of that right as contained in the VIIth Amendment. It ill behooves any court in the Federal system to deny the right to a trial by jury in a suit at law or in a Declaratory Judgment proceeding where there are disputed facts involved and the amount in issue is in excess of $20.00, yet that was done by the trial court in this case and while the Court of Appeals admitted the error, it refused to reverse the case because of the interpretation it had placed on the contracts. Courts were never under greater responsibility to enforce constitutional rights than they are under today.

That there were and are disputed issues of fact between Magnolia and Oklahoma is plainly apparent from the allegations contained in the complaint, in the amended answer and cross-complaint, and in the reply.[3]

The pipe line industry is a vast one, both in extent and costs. Its construction problems differ widely from those common to other industries. No court of appeals and no trial court should be permitted, in determining the rights and liabilities under pipe line contracts to disregard both the VIIth Amendment and the Rules of Civil Procedure for the District Courts.

Liberty Oil Co. v. *National Bank,* 260 U.S. 235
Shields v. *Thomas,* 18 How. 253
Re *Simons,* 247 U.S. 231
Baylis v. *Travelers' Insurance Co.,* 113 U.S. 316.
Jacob v. *New York,* 315 U.S. 752.

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[3] "How damages for a breach of contract are to be measured is a matter of law; but whether any damages were, and the amount thereof, are usually questions of fact. Other questions of fact include the right to extra compensation, or the amount thereof, the amount of a balance due on a contract, whether particular circumstances increased the cost of performing the contract, and to what extent, whether deductions or offsets should be allowed or in what amount, and whether one is entitled to recover on a counterclaim." 17 C.J.S. Par. 631).

Parsons v. *Bedford*, 3 Pet. 433
Slocum v. *New York, etc.*, 228 U.S. 364
Bailey v. *Central Vermont R. Co.*, 319 U.S. 350.
Dimick v. *Schuedt*, 293 U.S. 474
Hodges v. *Easton*, 106 U.S. 408
United States v. *Regan*, 232 U.S. 37.
Galloway v. *United States*, 319 U.S. 372.
Enelow v. *New York Life Ins. Co.*, 293 U.S. 379.
Aetna Casualty and Surety Company v. *Quarles*, et al., 92 Fed. (2nd) 321.
Piedmont Fire Ins. Co. v. *Aaron, et al.*, 138 Fed. (2nd) 732
Ettleson v. *Metropolitan Life Ins Co.*, 137 Fed. (2nd) 62.
Pacific Indemnity Co., v. *McDonald, et al.* 107 Fed. (2nd) 446.
Arnstein v. *Porter*, 154 Fed (2nd) 464.

That is to say *the refusal of the trial court to grant a jury trial upon written demand of the defendant therefor and the refusal of the Court of Appeals to reverse the trial court by reason thereof are in conflict (1) with the VIIth Amendment, (2) the Rules of Civil Procedure issued by this Court and mandatorily binding upon all inferior Federal courts, (3) the rules established by the cases in this Court in its opinions and judgments concerning jury trials, and (4) applicable cases in other Courts of Appeals.*

2. *There was fraud upon the judicial process,* whether intentional or otherwise counsel do not undertake to state. Such fraud was brought to attention of the Court of Appeals under Rule 60(b) of the Federal Rules of Civil Procedure and that court should have reversed the trial court and remanded the case for the determination of the issue and for the allowance of a jury trial in a retrial of the case.

The integrity of the judicial process is one of the principal keystones in the arch of constitutional government. The courts generally have been both astute and vigilant to ferret out and correct any fraud or gross irregularity in the judicial process, particularly if such fraud or irregularity could, or did influence the judgment of the court

or the verdict of the jury. Counsel for Oklahoma are fully aware of the gravity of their charge but nothing less seems justified on the basis of the newly discovered material evidence first discovered after the judgment of the trial court and after the affirming opinion of the Court of Appeals which was promptly brought to the attention of that Court as a part of a motion for rehearing (R. 1025-1030) as provided in Rule 60(b) of the Federal Rules of Civil Procedure.

Oliver v. *Shattuck*, 157 Fed (2nd) 150.
Fiske v. *Buder*, 125 Fed. (2nd) 841.
Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 322 U.S. 238.
3 Moore's Federal Practice, 1938, 3267 et seq.
Moore & Rodgers, Federal Relief from Civil Judgments, 55 Yale L.J. 623, 653-659.

During the course of the proceedings in the trial court, counsel for Oklahoma made demand that Magnolia furnish the record showing the orders for purchase of the pipe, the orders for shipment, the dates of shipment of such orders, and the quantities thereof for the construction of the pipe line from Corsicana to Patoka. Representatives of Magnolia purported to comply with the demand and represented that the papers delivered were all of the records of the purchases, orders for shipping, and shipments of the pipe (R. 351-353). Magnolia's counsel made the records so furnished a part of the trial record (R. 873-948), though many of such records are contained in the printed record here in summary form, only.

After trial and the judgment at the conclusion thereof dismissing the claims of Magnolia for a money judgment and entering judgment in favor of Oklahoma for some $11,000.00-odd for watering a part of the pipe line, and after the appeal by Oklahoma to the Court of Appeals and its judgment had been rendered, affirming the judgment of the trial court, Oklahoma, by mere chance, discovered that during the months of August and September 1947, when it badly needed pipe to continue construction and could not secure the same from Magnolia, that Com-

pany, Magnolia, had diverted and transferred to the Humble Pipe Line Company, another separate and sister pipe line company in the Standard Oil family, at least 40 miles of the identical pipe which Magnolia was using for the construction of the Corsicana-Patoka line.

An affidavit executed June 27, 1952 by Mr. W. P. Hughes was obtained by Oklahoma and filed by counsel in the Court of Appeals on July 24, 1952, as follows:

"State of Texas)
County of Harris) SS

"Before me the undersigned authority personally appeared W. P. Hughes, resident of Harris County, Texas, who after having been duly sworn deposes and says:

"My name is W. P. Hughes, a resident of Harris County, Texas. In the year 1947 I was employed by Joe D. Hughes, Inc., as pipe Stringing Superintendent. During the months of August and September 1947 I was in charge of hauling from Mayes Bros. Inc. Coating Plant in Harris County, Texas approximately 40 miles of twenty (20") inch O.D. steel line pipe—said pipe was stenciled 'Magnolia Pipe Line Company, c/o J. E. McGeath'. This pipe was shipped by Youngstown Sheet and Tube Company, Youngstown, Ohio. This pipe was strung on Humble Pipe Line Company's right-of-way and laid in Humble's system between their Satsuma Pump Station and Baytown Tank Farm by Latex Construction Company of Houston, Harris County, Texas and placed in operation on or about November 1, 1947.

/s/ W. P. Hughes

"Sworn to and subscribed this 27th day of June 1952.

/s/ Casper C. Winter

Notary Public, Harris County, Texas." (R. 1034).[4]

The Youngstown Sheet and Tube Company, Youngstown, Ohio, was one of the two pipe manufacturers supplying

[4] This affidavit is corroborated in a letter dated July 29, 1952, from Mayes Bros., Inc., to counsel in this case which has been sworn to by the office manager of the said Company, as follows:

pipe for installation in the Magnolia line and the shipping orders issued by Magnolia from time to time required the pipe to be shipped to "Magnolia Pipe Line Company, c/o J. E. McGeath" (R. 923-971). We repeat that no evidence was produced by Magnolia that the suppliers failed to make delivery in any instance in accordance with the shipping orders.

"H. Boyd Mayes
President & General Manager
MAYES BROTHERS INCORPORATED
Pipe Cleaning, Coating & Wrapping Contractors
1150 McCarty Street
Box 2062,
Houston, Texas
July 29, 1952

"Mr. William S. Campbell
Mercantile Bank Building
Dallas, Texas

Dear Sir:

"Complying with your request contained in your letter of July 28, 1952, this is to advise that Houston Belt and Terminal Railroad Company delivered to us approximately forty (40) miles of 20" OD 65.71 pounds per foot steel line pipe, during August 1947. Same having been consigned to Magnolia Pipe Line Company, care of Mayes Brothers, Inc., Houston, Texas, and was shipped by Youngstown Sheet and Tube Co., Youngstown, Ohio.

"This pipe was unloaded at this plant, coated and wrapped, and laid in Humble Pipe Line Company's system between Satsuma and Baytown by Latex Construction Company."

Yours very truly
MAYES BROTHERS INCORPORATED
/s/ L. T. Daugherty

.....
L. T. Daugherty, Office Manager.

Subscribed and sworn to before me this the 29th day of July 1952.

/s/ R. E. Webb,
Notary Public in and for Harris County, Texas."

This affidavit is not in the printed record here but it had been filed in, and brought to the attention of, the court below. A photostatic copy of the original document has been filed with the clerk of this Court under certification of the Clerk of the Circuit Court.

If these affidavits by Mr. Hughes and by a representative of Mayes Bros. Inc., correctly state the facts—and their truth or falsity may be established only after hearing the evidence in open court—it is unquestionable that 40 miles of pipe, which could have been used by Oklahoma in completing Section 4 of the pipeline and commencing work on Sections 5 and 6, were diverted and transferred by Magnolia during this time of need by Oklahoma to the Humble Pipe Line Company and used by that company in its pipeline.

It is equally unquestionable that if these affidavits correctly state the facts and had these facts been brought to the attention of the trial court, as a part of the evidence, the bottom would have fallen out of Magnolia's defense that it was unable to secure pipe from its suppliers when needed by Oklahoma. Even credulity leaves no room for belief that Vice President and General Manager True of Magnolia and President Latimer did not know in 1950, at the time of this trial before Judge Atwell, that in August and September 1947, 40 miles of identical 20-inch O.D. Steel Pipe was transferred, diverted or what have you by Magnolia to the Humble Pipe Line Company (Ante, pp. 9-10; Post 27-28).

The failure of Magnolia to furnish with the shipping records and pipe purchase records the documents showing this transaction and the diversion of 40 miles of 20-inch steel O.D. pipe to Humble in August and September 1947, constituted suppression of evidence, vital to defendant, Oklahoma in the prosecution of its cross-complaint and constitutes a fraud on both the courts and Oklahoma.

We have heretofore stated that Magnolia filed no defense or explanation whatever in the Court of Appeals in opposition to the allowance of the motion based on this newly discovered and material evidence.

Fraud vitally affects even the most solemn judgments and decrees. *Nudd* v. *Burrows,* 91 U.S. 426. Fraud will vitiate any adjudication when discovered and brought to the attention of the court, *Kieley* v. *McGlynn,* 21 Wall. 503. The Court will deprive any party of the benefits of a judgment obtained by fraud and if brought to the attention of the court, even after judgment, equity will restrain the enforcement of such judgment. *Simon* v. *Southern R. Co.,* 236 U.S. 115, *Hewitt* v. *Hewitt,* 17 Fed. (2nd) 716; Where fraud or deception practiced by one party prevents the other party from exhibiting fully his case to the court, the judgment or decree will be set aside, *United States* v. *Throckmorton,* 98 U.S. 61; *Toledo Scale Company* v. *Computing Scale Company,* 261 U.S. 399; *Steel* v. *St. Louis Smelting & Refining Co.,* 106 U.S. 447; *Michaels* v. *Post,* 21 Wall. 398.

There was not only failure of Magnolia to bring to the attention of the trial court that in August and September 1947, it had diverted and transferred to Humble Pipe Line Company 40 miles of 20-inch O.D. steel pipe delivered to it in August 1947 by its supplier but the sworn testimony of representatives of Magnolia in the trial court is that at this time—when Oklahoma was clamoring for pipe and Magnolia was diverting 40 miles of pipe to the Humble Pipe Line Company—such representatives did not know where such pipe could be obtained. Mr. True, vice president and general manager of Magnolia testified:

> "We tried other companies and other mills.
> "Q. Did you have any pipe in open stock piles?
> "A. We didn't have any pipe anywhere, other than pipe we had on Sections 2 and 3. We did have some 100 miles of pipe out on Sections 2 and 3. (R. 237-238).
>
> "Q. Now as of September 3, 1947, did you know at any time when or where you would get the 16 or 18 miles to fill out the pipe undelivered on Section 4?
> "A. No, sir, I didn't know when, or if ever, we would get that pipe." (R. 243).

At page 210 of the record the President of Magnolia, Mr. Latimer, testified on direct examination:

> "Q. Did you make any effort, Mr. Latimer, at about that time, to secure 20-inch pipe to fill out the balance on Section 4 and pipe for Sections 4 and 5?
> "A. We made every effort we knew how, at that time. I called Mr. McConnon, general sales manager of National Tube in Pittsburg, on two different occasions; I had numerous conversations along about that time, trying to get more pipe.
> "Q. Did you make efforts such as United Gas, and other companies, to get pipe?
> "A. We searched the industry to find pipe, yes, sir.

At page 311 of the record Mr. Latimer further testified:

> "Q. On 5 and 6, what efforts did you make to secure pipe?
> "A. We kept after the mills to get additional pipe, and talked to our parent Company, Socony-Vacuum, we apprised them of our situation. They had some pipe going to South America that they released to us. I believe that was Youngstown.
> "Q. Was that some 57 miles?
> "A. I believe that is the correct figure."

And at page 312 of the record Mr. Latimer continued:

> "Q. Isn't it a fact that insofar as Magnolia is concerned, with these pipe suppliers as to tonnage, you tried to give this 20-inch pipe priority?
> "A. We wanted to give that line priority, yes, sir."

Mr. True testified that Magnolia knew the latter part of July 1947, that National Tube "would be delayed in delivering this pipe" (R. 238), information which was not relayed by Magnolia to Oklahoma. Mr. True had this knowledge at the same time he or his Company diverted 40 miles of the pipe to the Humble Pipe Line Company—a diversion made at a time whilst Mr. True and Mr.

Latimer testified they were scouring the mills and countryside in search of necessary pipe to deliver to Oklahoma so it could continue operations!

We believe that our claim of suppression of evidence and of fraud on the trial court on the part of Magnolia is amply sustained by a comparison of such testimony by Messrs. True and Latimer with the above quoted affidavits executed by Mr. Hughes and by the office manager of Mayes Brothers, Incorporated. We also have a photostatic copy of papers showing shipments of pipe to Magnolia in care of Mayes Bros. Inc., copies of which, likewise have been deposited with the clerk of this court. Upon a new trial, the witnesses and documents will be produced to establish this diversion of the pipe and, if possible, the reasons why the evidence was withheld from the trial court and counsel for Oklahoma.

While formerly relief could be had in such a case by a bill of review, it may now be obtained under the specific terms of Rule 60(b) of the Rules of Civil Procedure for the District Courts.

Oliver v. *Shattuck*, 157 Fed. (2nd) 150.
Kennedy v. *Georgia State Bank*, 8 How. 586.
Purcell v. *Miner*, 4 Wall. 519.
Easley v. *Kellom*, 14 Wall. 279.
Craig v. *Smith*, 100 U.S. 226.

3. The pipeline industry is a great and growing industry, with investments of many millions and effecting millions of users of fuel oil and gasoline and effecting both consumers and producers of competitive fuels. *The construction placed by the courts below on the contracts here involved, practically identical in terms, will have far-reaching influence. That construction of the said contracts is so grossly in error that it should not be permitted to stand.*

The claimed motivation of Magnolia for its actions under the contracts in refusing to furnish 20-inch steel

pipe to Oklahoma with which it could continue, and even complete its sections of the 650 mile pipe line before winter weather rendered construction operations impossible or most expensive were three: (1) That in July, August and September 1947, or even later the pipe line manufacturers were shut down by strikes, or labor troubles; (2) That the 100 miles of pipe on Sections 2 and 3 not needed by the respective contractors for quite some time could not be removed without rendering Magnolia liable to such contractors in damages if the pipe could not be replaced when needed by them;[5] and (3) That Magnolia wanted to first complete Sections 1, 2 and 3 to Conway, Arkansas, before December 31, 1947, so that said Company could pay additional dividends to a maximum of 7% under the Consent Decree on the several millions of dollars invested by Magnolia in the pipeline in use on December 31, 1947, from Corsicana to Conway.

Oklahoma insists that the real and controlling reasons why Magnolia did not deliver the pipe so that Oklahoma could continue construction operations in August, September and succeeding months, until winter weather arrived or the line was completed, are: (1) Magnolia, as it now appears, diverted 40 miles of the pipe in August and September, 1947, to the Humble Pipeline Company, thereby using the pipe for a different purpose than furnishing it at appropriate railheads for use on Sections 4, 5 and 6 of the pipe line and then suppressed evidence thereof from both the trial court and Oklahoma, and (2) That when Magnolia realized in the summer of 1947, after it had diverted the 40 miles of pipe to Humble Pipeline Company, that enough additional pipe probably could not be obtained to fully complete the pipeline from Corsicana to Patoka, Magnolia decided to concentrate on completing the line to Conway and place the Corsicana-Conway segment in operation before December 31, 1947, in

[5] Any such argument by Magnolia is, in effect, an admission of liability to Oklahoma for failure to furnish pipe as needed and the supplier of pipe had delivered same to Magnolia.

order to obtain for its stockholders the increased dividend under the Consent Decree, reported to have been approximately $1,000,000. (R. 386-387). In order to be sure of the latter accomplishment, Magnolia determined to retain the 100 miles of pipe on Sections 2 and 3 and even to employ a third construction contractor, Oklahoma, to assist one of the other two contractors in completing Section 3 of the line to Conway. The record shows the slow progress of the contractor on Section 3 of the line (R. 880-886).

Magnolia admitted that at least one of its primary motives was to get the line from Corsicana to Conway in operation before December 31, 1947, in order to pay the additional dividends to its stockholders (R. 683).

Magnolia's claim that it could not obtain the pipe in 1947 for the line because of labor troubles in the pipe manufacturing plants is completely spurious and is so proven by the newly discovered evidence that during this alleged labor trouble period Magnolia received delivery from a pipe manufacturer of, and diverted 40 miles of pipe to the Humble Pipeline Company. Later the factories did deliver the pipe for Sections 5 and 6 but before all of it could be installed, after it was delivered by the pipe suppliers and furnished by Magnolia, the wet weather appeared, to which reference has been previously made (Ante, pp. 12-13).

In other words, the pipe manufacturers could and did deliver 40 miles of pipe to Magnolia at the very time, or close thereto, when Messrs. True and Latimer testified that their company could not locate any pipe. Also, the desire of Magnolia to pay greater dividends to its stockholders, by placing a segment of the pipe line to Conway in operation by the end of 1947, was equally no excuse for failure to use some of the 100 miles of pipe on Sections 2 and 3 to enable Oklahoma to continue on Sections 4, 5 and 6.

Under the holdings of the courts below the contracts and their specifications absolved Magnolia from all damages as for breach of the contracts in failing to furnish pipe sufficient to enable its contractors to continue to the completion of their various segments of the pipeline within the periods of time respectively fixed in the contract papers therefor after orders to proceed. (Ante 5). We assert without fear of successful contradiction that the construction placed on this contract by the Circuit Court is grossly erroneous but even if it could be held otherwise, Magnolia may not escape liability for the excess costs of Oklahoma upon the showing that Magnolia had diverted 40 miles of pipe to the Humble Pipe Line Company at a time in August and September 1947 when Magnolia knew only too well that Oklahoma was nearing exhaustion of the pipe on Section 4 and was asking for additional pipe to complete said section and to commence work on Sections 5 and 6 of the pipeline.

The applicable terms of Article 4 of the respective contracts and of the specifications have been quoted in the "Statement" herein. (Ante, p. 4-6). We submit that under the terms of such contracts, properly construed, Magnolia may not escape damages for the delay and neglect in the delivery of pipe unless same was due "to failure of pipe supplier to deliver pipe according to present schedule of delivery or if the company is unable to furnish the materials so needed for any other reasons beyond its control."

The pipe supplier did not fail in delivery of 40 miles of pipe, a very large quantity, to Magnolia. The pipe suppliers delivered the same at the time Oklahoma needed it, but, unknown to Oklahoma, Magnolia diverted the pipe to the Humble Pipe Line Company. Certainly the failure of Magnolia to furnish these 40 miles of pipe to Oklahoma was not due to failure of the pipe supplier to deliver pipe to Magnolia nor was the diversion a cause of delay to Oklahoma beyond the control of Magnolia.

As to the refusal of Magnolia to prorate the 100 miles of pipe it had at the railheads elsewhere for Sections 2 and 3 of the pipeline among the several unfinished sections in accordance with the then present needs of the respective contractors, instead of bunching or piling the same up on Sections 2 and 3 where it could not be, and was not used for literally months (R. 386-388), the resulting failure of Oklahoma to receive the pipe from Magnolia as "needed" was certainly not a failure of the pipe supplier to deliver pipe to Magnolia nor was it a delay beyond the control of Magnolia. If the contrary were true, Magnolia could have bunched or piled the entire supply of pipe it received from time to time from its pipe suppliers on the banks of the Mississippi, refused to distribute any pipe to the contractors, and could have claimed in defense of claims for their damages because of such refusal that if the pipe were removed, Oklahoma might have a claim against the Company for damages in event the pipe was not replaced and, too, Magnolia wanted to get the pipe installed to Patoka in order to ship crude oil from barges on the Mississippi River through that segment of the line to Patoka to connect there with another pipeline or tank cars to the east.

The good faith of Magnolia as to its fear of being unable to replace the pipe on Sections 2 and 3 if part of the 100 miles of pipe was furnished to Magnolia is impunged by the admission of Magnolia's officers that one of the primary reasons it had for wanting to complete the line from Corsicana to Conway by December 31, 1947, and get the same in operation was the desire of Magnolia to be able to pay its stockholders increased dividends based on 1947 use of the Corsicana-Conway segment of the pipeline. Also, such good faith is impunged by the knowledge of Magnolia's officials that said company had received delivery of 40 miles of the pipe during the alleged labor trouble period which said company had diverted to other uses.

The rights, and even the solvency of Oklahoma were not left by the contracts to the whim and/or arbitrary action of Magnolia. Under Article 4 of the respective contracts there was no exculpation of Magnolia for failure to furnish pipe as needed except for failure of pipe supplier to deliver pipe to Company according to the present schedule of delivery or if Company was unable to furnish the materials as needed for any other reason beyond its control.

Nothing in these contracts or specifications provided that Magnolia should not be held liable in damages to the contractor if Magnolia diverted forty miles of the pipe to another pipeline company instead of furnishing the same to the contractors as needed; nothing in these contracts provided that Magnolia should not be liable in damages, if it furnished such quantities of pipe to two contractors, that could not use the same for months to come, while other contractors for other segments of the pipeline then needed pipe in order to continue construction operations; nothing in these contracts provided that Magnolia should not be liable in damages if for purposes of its own, particularly for the great material gain of its stockholders, Magnolia elected to complete one segment of the line to Conway and, in effect, held in reserve sufficient pipe for use months later in completing the line when other contractors, as Oklahoma, were badly in need of pipe in order to continue their construction operations.

Emphatically, nothing in the contract and specifications absolved Magnolia from damages when it elected to refuse to furnish pipe and other materials to one contractor as it needed the same in order that Magnolia could hold in reserve 100 miles of the pipe for use at some future date and when it further elected to divert 40 additional miles of the pipe to another and distinct pipe line company. On the contrary, such delays in

furnishing the pipe to the contractor needing the same was not due to failure of the pipe supplier to deliver pipe to Magnolia nor was it due to any other reason beyond the control of Magnolia; under Article 4 of the contracts Magnolia is liable in damages for such delays.

Under the contrary construction of these contracts by the Court of Appeals, pipe line contractors, with their millions of dollars invested in equipment, could not undertake to perform contracts for pipe line companies without adding literally millions of dollars to their contract prices in order to protect themselves against what has happened in his case, thereby increasing the costs to all consumers of products transported by pipe line or of competitive products, including additional costs to the United States in supplying its military and naval forces. Fuel oil and gasoline, for instance, are required in large quantities by our armed forces.

The necessity that the courts enforce the liability of pipe line companies under their contracts is of such public importance that this Court should grant certiorari and review both the judgment of the court below and its order refusing to grant a new trial because of a fraud on the judicial process in the failure of Magnolia to disclose to the trial court and to counsel for Oklahoma that 40 miles of the pipe had been diverted to another pipeline instead of being furnished to Oklahoma to in part meet its needs for pipe for installation purposes.

4. *The concern of the public is very great in the proper regulation and taxation of pipe line companies and is adversely affected by the decisions below.*

Petitioner Oklahoma claims that its losses on this job in excess of one million dollars resulted from the failure of Magnolia to furnish pipe when needed by Oklahoma for installation; from Magnolia's diversion of 40 miles of pipe to the Humble Pipe Line Company; and

from Magnolia's refusal to ratably distribute 100 miles of pipe among the several sections of the Magnolia line as needed by the respective contractors. This excess cost should be paid by Magnolia to Oklahoma and not go into the rate base of Magnolia for rate making purposes; should not be made available to Magnolia to capitalize in its costs for depreciation in its corporate tax returns; and should not be used in order to enable Magnolia to pay increased dividends to its stockholders in 1947 by completing the line to Conway and placing it in use.

There is a very serious question whether the completion of the segment of the line to Conway in the latter part of December 1947, and the running through the segment of a driblet of crude oil to be shipped in tank cars in the closing days of the calendar year 1947 is such good faith compliance with the Consent Decree of 1941 as to authorize the payment of the increased dividends to the stockholders in that tax year.

We appreciate that the Court may not be able in these proceedings to inquire into these matters—but the public importance thereof can not be gainsaid and Petitioner Oklahoma insists that its losses in excess of one million dollars under these contracts with Magnolia and solely due to Magnolia's fault and negligence should be paid by Magnolia and not used for the benefit of Magnolia and its stockholders, irrespective of the possible benefit or detriment to the public.

CONCLUSION

In summation, petitioner claims that under the judgments of the courts below it has been denied its rights under Articles Vth and VIIth of the Bill of Rights; that such courts have ignored and refused to abide by the applicable Rules of Civil Procedure for the District Courts of the United States; that they have grossly misinter-

preted the contracts in suit; that they have ignored the public interests involved of requiring interstate pipe line companies to perform their contracts; that the Circuit Court in denying the motion for rehearing based in part on newly discovered and material evidence has impliedly, at least, condoned and approved what we consider to be fraud on both the trial court and the petitioner; and that both courts are thereby in conflict with decisions of this Court and of other Courts of Appeal.

For any or all of such reasons, this petition for certiorari should be granted.

Respectfully submitted,

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December 5, 1952.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 484

OKLAHOMA CONTRACTING COMPANY, INC., *Petitioner,*

v.

MAGNOLIA PIPE LINE COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

An unreported memorandum opinion of the trial court filed February 14, 1950, is in the record (R. 455) along with its judgment and findings of fact filed February 20, 1950. (R. 468-474). The opinion of the Circuit Court of Appeals was filed March 22, 1952. It has been reported in 195 F. 2d 391 and is in the record. (R. 993-1002).

QUESTIONS PRESENTED

No new questions of law are involved in this case. It simply involves the construction of a contractual provision

that petitioner should have no claim of any character whatsoever for damages for delay or work stoppage due to failure of pipe supplier to deliver pipe to respondent according to the Schedule of Delivery of Pipe contained in the contract. These contracts were entered into on April 30, 1947, at a time when pipe was in sharp demand and no guarantee of delivery date would be given by the pipe supplier. Consequently, respondent had to protect itself when entering into contracts involving the laying of pipe ordered and not yet delivered.

STATEMENT

The statements of the petitioner (p. 2) are so erroneous, incomplete and inflammatory that respondent must challenge them in toto.

The facts are accurately and precisely stated by the Circuit Court of Appeals in its opinion (R. 994-997) and will not be repeated here.

Petitioner is guilty of a most flagrant and typical misrepresentation on page 2 of its petition, wherein it states in the first paragraph under the "Statement":

> "* * * and Magnolia produced no evidence that there were delays by the pipe supplier as to any of these shipping orders."

The Court's attention is invited to the testimony of W. C. Moser, Manager of Sales of the National Tube Company, in Dallas, Texas, wherein he testified that National Tube Company was not able to meet the schedule of pipe deliveries and the requisitions issued by respondent therefor (R. 322-327). Mr. True, Vice-President and Manager of the Magnolia Pipe Line Company, testified to the same effect (R. 234). Mr. Latimer, President of Magnolia Pipe Line Company, testified to the same effect (R. 310). In fact, it is undisputed in the record that there was a delay by the pipe supplier to deliver the balance of the pipe to complete the balance of Section 4, otherwise there would

have been no lawsuit for the reason that there would have been no delay. It is undisputed that the pipe was requisitioned by the Company strictly in accordance with the schedule set up for the delivery of pipe set forth in the contract (R. 222-223).

Petitioner attempts to inject into the statement of the case as a fact that pipe was diverted to Humble Pipe Line Company (pp. 7-9). This is not true and is a belated attempt to inject into this case a transaction that has no bearing whatsoever upon the questions involved in this appeal. This matter will be gone into in detail in answer to this argument of petitioner, but at this point respondent categorically denies any such false accusation and labels it exactly what it is, a figment of the imagination and a fabrication manufactured out of the whole cloth. As shown by petitioner's motion on "Newly Discovered Evidence" (R. 1029-1030), the pipe received at Houston, Texas, was Youngstown pipe, and it is undisputed in this record that every foot of Youngstown pipe, consisting of 369 miles, that Magnolia Pipe Line Company had on order was delivered to Sections 1, 2, 3, and 4 of the pipe line in accordance with the schedule, or a little ahead of the same, and in strict accordance with the requisitions issued by the Company (R. 236).

ARGUMENT

Petitioner has applied for writ of certiorari on the following four grounds:

1. Oklahoma was denied its constitutional right to a jury trial and due process of law.

2. There was fraud upon the judicial process and that such fraud was brought to the attention of the Court of Appeals, under Rule 60 (b) of the Federal Rules of Civil Procedure, and that that court should have reversed the trial court and remanded the case for the determination of the issue and for the allowance of a jury trial in a retrial of the case.

3. The pipe line industry is a great and growing industry with investments of many millions and affecting millions of users of fuel oil and gasoline, and affecting both consumers and producers of competitive fuels; the construction placed by the courts below on the contracts here involved, practically identical in terms, will have far-reaching influence; that construction of said contract is so grossly in error that it should not be permitted to stand.

4. The concern of the public is very great in the proper regulation and taxation of pipe line companies and is adversely affected by the decisions below.

The issue in the present case involves the construction of a contractual provision for release of any claim for damages in the event pipe supplier failed to deliver pipe in accordance with the tentative schedule of pipe deliveries so furnished by the pipe supplier. It involves no unique question of law and has been passed upon in countless cases from time immemorial. No amount of strained assumptions or false constructions can convert this case into one warranting review by this Court on certiorari. Respondent submits that the grounds set out as reasons for granting the writ are not well founded and that the decision below is clearly correct. The decision in nowise conflicts with any decision of another circuit court of appeals. Nor has the court below denied any question of local law in conflict with applicable local decisions, or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. We turn now to a discussion of the reasons assigned by the petitioner for granting the writ of certiorari.

(1) Petitioner Was Not Denied Any Constitutional Right to a Jury Trial and There Was No Violation of Due Process of Law.

This question of the denial of a jury in the trial court was squarely met and correctly decided by the Circuit Court in its opinion below. Since the only question involved was the construction of a plain and unambiguous contract, it would have been futile to have impaneled a jury to be instructed by the court to return a verdict for respondent.

The petitioner, in its reply brief filed in the Circuit Court of Appeals, concedes the correctness of this holding when on page 93 of its reply brief it states the following:

> "Oklahoma agrees that all rights and liabilities of appellant and of appellee are primarily governed by the construction of the clear and unambiguous contracts made and entered into by the parties on April 30, 1947."

and when on page 94 of the same brief it says:

> "We respectfully submit to this Honorable Court that, if this case had been tried before a jury, it would have been proper for the Trial Court to instruct the jury to return a verdict in favor of Oklahoma, upon a proper construction of the contracts and the uncontroverted proved damages of Oklahoma."

Respondent submits, that if it were proper for the trial court to direct a verdict in favor of petitioner, it was likewise proper for the trial court to instruct a verdict for respondent, which it in effect did when it construed the contract to release respondent from any claim for damages for delay of the pipe supplier in the delivery of pipe.

The construction of the contract involved was for the trial court. In *City of Orlando* v. *Murphy,* 84 F. 2d 531, 534, the Fifth Circuit Court stated:

> "Where the parties, as alleged in the declaration in this case, have reduced their agreement to writing,

> questions as to the construction of the contract are usually for the court. It should receive that construction which will best effectuate the intention of the parties as expressed therein. This intention must be collected from the whole agreement; and, while the court will not undertake to make contracts for the parties, where an instrument is susceptible of two meanings, it will be given a reasonable rather than an unreasonable construction, and, when possible, a contract should receive such construction as will uphold it, rather than render it nugatory. Fed. Law of Contracts, c. 13."

In the *City of Orlando* case a similar provision for release from damages was involved, and the court held that as a matter of law the same released the City of Orlando from any claim for damages.

The trial court, at the time of the trial, had already ruled upon two motions to dismiss the case and a motion for summary judgment, and in connection therewith had considered the pleadings, contracts, affidavits and depositions of the parties and arguments of counsel, all of which showed conclusively that there were no fact questions to be passed on by a jury in this case. Respondent submits that the only question involved in this case was a question of law involving the construction of the terms and provisions of a contract, and that the same was correctly construed by the courts below, and no question is raised for the review of this Court.

(2) There Was No Fraud Upon the Judicial Process in This Case.

This argument of petitioner is pure fabrication and stems from what is termed a "Motion On Newly Discovered Evidence," shown on pages 1025-1030 of the record, and what is termed "Newly Discovered Evidence Instruments," shown on pages 1031-1035 of the record. Petitioner attempts to argue from these instruments filed July 24, 1952, and August 1, 1952, while the second petition for re-

hearing was pending, that these show a diversion of pipe. On the contrary, petitioner's complaint, as shown by the opinion of the court below, was that Magnolia Pipe Line Company refused to divert pipe from other contractors.

Respondent categorically denies that it diverted any 20" pipe which it had on order with Youngstown Sheet and Tube Company and hereby states under the undisputed facts in the record in this case that it received every foot of 20" pipe that it had on order from Youngstown Sheet and Tube Company, and the same was shipped to its contractors on the 20" Corsicana, Texas-to-Patoka, Illinois pipe line. As shown by exhibit on page 923 of the record, and introduced in evidence (R. 351-352), respondent had 369 miles of Youngstown pipe on order. As shown by exhibit on pages 916-922 of the record and introduced in evidence (R. 351-353), respondent instructed its purchasing department to requisition and have delivered the full 369 miles of pipe to the contractors in accordance with the schedule set up in the contract; and as shown by requisitions actually issued by the company (R. 941-971) and introduced in evidence (R. 351-353), such pipe was so requisitioned. Under the undisputed facts the Youngstown pipe which respondent had on order was delivered to Sections 1, 2, and 3 and the balance of said pipe, to the extent of approximately 57 miles, was shipped to Section 4; that at that point the pipe that was on order from the National Tube Company was to be delivered to Section 4 in sufficient quantities to complete that section of line, but, as already shown, there was a delay in shipment by National Tube Company. The testimony of Messrs. Latimer and True set out in petitioner's brief was correct on the date that it was given, is true today, and will be true tomorrow.

The irresponsible charges made by the attorneys for petitioner are not supported by the very instruments on which they rely. The affidavit of W. P. Hughes (R. 1025) simply states that some 20" pipe stenciled "Magnolia Pipe Line Company, c/o J. E. McGeath" was shipped by Youngs-

town Sheet and Tube Company, delivered at Houston, and laid in Humble Pipe Line Company's system. A similar statement is made in the affidavit of L. T. Daugherty (R. 1032-1033).

All of the 369 miles of pipe which this respondent had on order with Youngstown Sheet and Tube Company for its Corsicana-to-Patoka pipe line was delivered to that pipe line, and there could have been no diversion. The instruments submitted to the Circuit Court were insufficient, were immaterial, and were merely cumulative evidence. New trials are never granted on merely cumulative evidence or evidence which tends merely to impeach or contradict witnesses who have testified at the trial. Assuming for the sake of argument that every statement in said affidavits is true and correct, the same would not affect the judgment either of the trial court or of the circuit court. The circuit court had before it these motions and saw that the same were insufficient and would not affect the result, and thereafter overruled the second petition for rehearing which included these motions and instruments without opinion. The decision of the lower court, denying the "Motion On Newly Discovered Evidence" and "Newly Discovered Evidence Instruments" in support of petitioner's second petition for rehearing, is eminently correct and no amount of irresponsible charges made by the petitioner in its brief can warrant review by this Court.

The case of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, cited by petitioner, is in nowise in point because extrinsic fraud was practiced upon that circuit court, and this distinction is ably stated by the court on page 245 when it says:

> " • • • This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. • • • "

Respondent denies that any perjury was committed. Petitioner attempts to say that the diversion of pipe was not

denied by the respondent. Immediately upon receipt of copies of such instruments, attorneys for respondent wrote the Clerk of the Circuit Court of Appeals for the Fifth Circuit, denied categorically any such allegations and requested of the clerk that they be advised if any reply denying such false charges was desired by the court. The clerk advised said attorneys that the matter was being referred to the Honorable Robert L. Russell, United States Circuit Judge who rendered the decision. No reply was received, but the second petition for rehearing was overruled on September 10, 1952. Your respondent realizes that this statement is outside the record as brought up, but in view of such false charges counsel believes that such statement is justified. Should any question arise concerning this statement, counsel for respondent will have the clerk make the proper certification relative thereto. Furthermore, the assertion of diversion of pipe was so false and was so apparent of record that no denial was necessary and no opportunity afforded respondent to do so. But, respondent denies such irresponsible charges in this, its first opportunity to do so.

The "Motion On Newly Discovered Evidence" (R. 1025-1030) and the "Newly Discovered Evidence Instruments" (R. 1031-1035) filed by the petitioner herein were made in support of its second petition for rehearing and were made a part of said petition for rehearing, and were duly considered by the circuit court and overruled in its order denying the second petition for rehearing, entered September 10, 1952 (R. 1030). The petitioner's false accusations have been duly considered and expressly overruled by the circuit court. The circuit court entertained jurisdiction thereof and did not ignore or refuse to pass upon it. Petitioner's complaint could only be that the circuit court refused to hold that such motions and the alleged newly discovered evidence were insufficient to affect its decision under the construction of the contract as placed thereon by that honorable court, and is not and could not be that

the court refused to consider it. The circuit court's decision in overruling the petition for rehearing that such motion and the evidence submitted in connection therewith were insufficient to affect its previous decision entered on March 22, 1952, was eminently correct, does not conflict with any decision of this court or with any other circuit courts of appeal. As was said by this Court in *Purcell* v. *Miner*, 4 Wall. 519, 521:

> "* * * He offers no new evidence, but what he might as well have produced before, and which, if it had been produced, would not have justified a decree in his favor."

(3) The Construction Placed by the Courts Below on the Contracts Here Involved Will Not Have Any Far-Reaching Influence, Is Not Grossly in Error, But on the Contrary Is Correct and Does Not Conflict With Previous Decisions Involving Similar Contractual Provisions.

The petitioner's attempt to create the impression that this decision is affected by the public interest is so far-fetched as hardly meriting an answer. Clauses similar to the ones involved in this contract are commonplace and customary and have been construed and enforced in countless cases.

In the case of *Wells Bros.* v. *United States*, 254 U. S. 83, it was held that, under a provision that no claim shall be made or allowed to contractor for any damages which may arise out of any delay caused by the United States, the contractor could not recover for any damages due to delay by reason of changing of materials.

In the case of *Wood* v. *United States*, 258 U. S. 120, where the contract provided that no claim would be made or allowed for damages which might arise out of any delay caused by the Government, damages due to delay caused by the Government's suspension of the work could not be recovered even though such suspensions were not expressly authorized by the contract.

The case of *H. E. Crook Company, Inc.* v. *United States*, 270 U. S. 4, involved a contract for furnishing and instal-

ling heating plants in buildings to be erected for the Government by other contractors and which contract showed on its face that progress under it would be dependent upon the progress of the buildings. The contract made no references to delays by the Government save as grounds for time extensions to the contract. It was there held that the Government was not bound to make good losses suffered by the contractor in performing the contract due to delays in completing the buildings.

In the case of *United States* v. *Rice*, 317 U. S. 61, it was held that, under a Government contract for the installation of equipment in buildings, and under which the contractor agreed to complete the work within the time allowed under another contract with another contractor for the construction of buildings, and wherein it was provided in the other contract that changes could be made therein, the delay caused contractor in the installation of equipment by reason of change of the plans in the main contract did not allow recovery by said contractor.

In *United States* v. *Howard P. Foley Co., Inc.*, 329 U. S. 64, where the construction contract provided for the installation of the runways of an airport, it was held that the Government was not liable for damages for delay in making the runways available to the contractor, though the delay prevented completion within the specified time, since the contract did not obligate the Government, expressly or impliedly, to make the runways available promptly, and the contract contained provisions anticipating delays caused by the Government, and the Court further held that the fact that no other contractor was involved did not require a result different from that reached in *Crook Co.* v. *United States*, supra, and *United States* v. *Rice*, supra.

The argument of petitioner that the construction placed upon the contracts here involved will result in pipe line contractors adding millions of dollars to their contract prices and thereby increasing the costs to consumers of products transported by pipe line is utterly ridiculous. On

the contrary, if the decision were made that a party cannot expressly relieve himself from any liability for delay caused by reason of the supplier of the material failing to deliver the material, and therefore would have to pay for all such delays, this would materially increase the cost of the facilities used by the pipe line companies. The express provision releasing the respondent from liability was in the contract and specifications at the time petitioner submitted bids, and the words of Justice Clarke, in *Wells Bros* v. *United States*, supra, are very much in point:

> "Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work."

Thus it is submitted that petitioner's attempt to inject public interest in this case is absurd.

(4) The Concern of the Public in the Proper Regulation and Taxation of Pipe Line Companies Is Not Adversely Affected by the Decisions Below.

The concern of the public may be very great in the proper regulation and taxation of the pipe line companies, but respondent can hardly see the materiality of this statement to this lawsuit. How the decision below could affect regulation of pipe lines or the taxation of pipe lines is beyond the understanding of respondent. The argument is made by petitioner in its petition that a million dollars should be paid to petitioner, as:

> " • • • This excess cost should be paid by Magnolia to Oklahoma and not go into the rate base of Magnolia for rate making purposes; should not be made available to Magnolia to capitalize in its costs for depreciation in its corporate tax returns; and should not be

> used in order to enable Magnolia to pay increased dividends to its stockholders in 1947 by completing the line to Conway and placing it in use."

Such a fallacious statement is utterly ridiculous and ludicrous, and would be a greater trick than any ever performed by Houdini during his lifetime. Respondent submits that such a line of argument adequately demonstrates the many immaterial, irrelevant issues that the petitioner has attempted to inject into this lawsuit, both in the trial and appellate courts, and petitioner should be compelled to follow the rules laid down for the trial and appeal of cases. Respondent submits that this petitioner has more than had its day in court.

In chronological order, the controversies here involved resulted in this sequence of litigation:

1. Oklahoma filed proceedings on September 1, 1949, in a district court of Dallas County, Texas, to perpetuate the testimony of L. H. True and George T. Jackson, employees of Magnolia (R. 69-72). Under Texas law this proceeding to perpetuate testimony is not of itself an independent suit, *Lambert* v. *Texas Employers Insurance Assn.* (Civ. App.), 121 S.W. 2d 406.

2. Magnolia, a Texas corporation, sued Oklahoma, a Delaware corporation, in the United States District Court for the Northern District of Texas at Dallas on September 19, 1949, on two counts, one under 28 *U.S.C.A.* § 1332 (R. 51), wherein Magnolia sought judgment against Oklahoma for $268,274.50 (R. 61, 205, 494), and a second separate count under 28 *U.S.C.A.* § 2201 (R. 51), seeking a declaratory judgment of all rights and liabilities between the parties (R. 50, 62).

3. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 4 watering down pipe, alleged failure to deliver pipe, retainage, and exemplary damages (R. 73-85).

4. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 1 watering down pipe (R. 86-90).

5. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 5 alleged failure to deliver pipe, discriminations in favor of other contractors on cost-plus basis, retainage, and exemplary damages (R. 91-102).

6. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering on Section 6 alleged failure to deliver pipe, retainage, and exemplary damages (R. 102-112).

7. Suit by Oklahoma against Magnolia, filed October 7, 1949, in a district court of Dallas County, Texas, covering Section 7, or the Red River crossing (R. 113-115).

In chronological order, the proceedings in the trial court took this sequence:

1. Original petition filed September 19, 1949 (R. 50).

2. Oklahoma's first motion to dismiss, "Addressed to the Discretion of the Court," filed October 10, 1949 (R. 63).

3. Order entered November 1, 1949, overruling first motion to dismiss (R. 116).

4. Second motion to dismiss of Oklahoma, "Addressed to the Discretion of the Court," filed November 14, 1949 (R. 117).

5. Original answer of Oklahoma, filed November 14, 1949 (R. 487).

6. Magnolia's motion for summary judgment, filed November 23, 1949 (R. 492).

7. Motion of Magnolia to strike second motion to dismiss, filed November 23, 1949 (R. 532).

8. Defendant's demand for jury, filed November 28, 1949 (R. 157).

9. Physical tender on November 29, 1949, by Magnolia of net retainage, amounting to $22,229.95, into the registry of the court (R. 543).

10. Amended answer and counterclaim of defendant, Oklahoma Contracting Company, Inc., filed December 2, 1949 (R. 162).

11. Reply of plaintiff, Magnolia Pipe Line Company, to answer and cross-action of Oklahoma, filed December 5, 1949 (R. 198).

12. Hearing on Magnolia's motion for summary judgment on December 5, 1949 (R. 558).

13. Order entered December 7, 1949, overruling amended motion to dismiss of Oklahoma, overruling motion to strike of Magnolia, overruling motion for summary judgment of Magnolia without prejudice to trial on the merits, and ordering the case to be tried as a nonjury case (R. 159).

14. The cause below was tried on the merits February 13-14, 1950 (R. Vol. I-iii, 206).

15. On February 14, 1950, Magnolia and Oklahoma entered into a written stipulation covering the total retainage of $60,857.92 and the net retainage of $22,229.95 then in the registry of the court (R. 908).

16. During the course of the trial, the Red River crossing claim was the subject of a stipulation (R. 469, 247), it appearing that this controversy had long previously been disposed of by written settlement between the parties (R. 576, 641-643).

17. The court below rendered an oral opinion on February 14, 1950 (R. 455).

18. The trial court made findings of fact and conclusions of law on February 20, 1950 (R. 468).

19. The trial court entered final judgment on February 20, 1950 (R. 471).

In chronological order, the proceedings in the circuit court of appeals took this sequence:

1. Upon appeal the case was submitted on oral argument on December 13, 1951, almost two years after the date of trial (R. 992).

2. Appellant had filed a brief and a reply brief.

3. The circuit court rendered its opinion on March 22, 1952 (R. 993-1002).

4. The circuit court rendered its formal judgment on March 22, 1952 (R. 1003).

5. Petitioner secured extension of time to file petition for rehearing, to May 12, 1952, by order dated April 7, 1952 (R. 1003).

6. The time for filing a petition for rehearing was further extended to May 22, 1952, by order dated May 6, 1952 (R. 1004), upon request of petitioner.

7. The petition for rehearing was filed on May 22, 1952 (R. 1005-1011).

8. A supplemental petition for rehearing was filed by petitioner on May 28, 1952 (R. 1013-1016).

9. In connection with this petition for rehearing and supplemental petition, petitioner filed a brief in support of its petition for rehearing, a supplemental brief in support of petition for rehearing, and a second supplemental brief of authorities and argument in support of its petition for rehearing.

10. The petition for rehearing was overruled by the circuit court on June 18, 1952 (R. 1017).

11. A second petition for rehearing was filed by petitioner in the circuit court on July 3, 1952 (R. 1019-1024); a brief in support of said second petition for rehearing was attached thereto.

12. Petitioner filed a "Motion On Newly Discovered Evidence" in support of its petition for rehearing in the circuit court on July 24, 1952 (R. 1025-1030).

13. Petitioner filed "Newly Discovered Evidence Instruments" in the circuit court on August 1, 1952 (R. 1031-1035).

14. Petitioner then filed in the circuit court "Appellant's Supplemental Brief In Support of Its Second Petition for Rehearing" and another brief labeled "Appellant-Petitioner's Supplemental Brief In Support of Its Petitions for Rehearing."

15. The second petition for rehearing, including the motions on newly discovered evidence and instruments filed in support of said second petition for rehearing, was overruled by the circuit court on September 10, 1952 (R. 1030).

Respondent has tried to meet fairly and honestly all side issues injected into this case haphazardly by the petitioner at all stages of the trial and appeal, and this Court should put an end to this case by a denial of the writ of certiorari.

CONCLUSION

WHEREFORE IT IS RESPECTFULLY SUBMITTED that the decision below is correct; there is no conflict in the decisions; no other reasons appear which would warrant further review; the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1952

No. 484

Oklahoma Contracting Company, Inc., *Petitioner,*

vs.

Magnolia Pipe Line Company, *Respondent.*

PETITIONER'S REPLY BRIEF

Preliminary Statement

Counsel for Oklahoma[1] categorically deny the correctness of the statements by Magnolia's counsel that "the only question involved was the construction of a plain and unambiguous contract" and that "it would have been futile to have impaneled a jury to be instructed by the court to return a verdict for respondent." (P. 5).

It is an indisputable fact that the judgment entered below in this litigation was adverse to Magnolia and in favor of Oklahoma on each and every alleged cause of action stated in Magnolia's complaint seeking a monetary judgment against Oklahoma. The only monetary judgment entered below was against Magnolia and in favor of Oklahoma on one of the causes of action alleged in the latter's cross-complaint, or counterclaim filed by Oklahoma. The trial court entered judgment against Okla-

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[1] As in the petition, the petitioner will be referred to herein as "Oklahoma" and the respondent as "Magnolia."

homa denying other causes of action set forth in the cross-complaint and against Magnolia on its claim against Oklahoma. Thus in no event would a jury have been instructed by the court *"to return a verdict for respondent"*, as stated by its counsel. (R. 468-474).

The other statement by Magnolia's counsel is equally in error that the "only question involved was the construction of a plain and unambiguous contract".

Obviously, no exculpatory stipulation in a contract may be construed in vacuo; such contract stipulations are for the sole and only purpose of determining the rights and obligations of the parties thereto on the basis of facts as they develop from time to time during the course of performance of the contracts. Such exculpatory provisions in contracts constitute a yardstick, as it were, for measurement purposes; they definitely are not the thing measured, in this case the facts of delay and stoppage of work as alleged in the amended answer and counterclaims filed by Oklahoma (R. 162-197). Under the Federal system, and in view of the Sixth and Fifth Amendments to the Constitution, due process of law requires, that the triers of fact shall be the jury, when demanded, and not the judge in a law action where the amount involved exceeds $20.00. This is horn-book law, specifically stated in the Sixth Amendment and declared in numerous decisions of both this Court and the Courts of Appeal. Some of these cases are cited in the petition (pp. 21-22).

Here the trial judge denied the written demand, seasonably made, of Oklahoma for a jury trial. The Judge, himself, proceeded to, and did, determine the facts. (R. 468-470).

The crux of this case lies in the facts, not in the exculpatory stipulation in the contracts. The case is here because the trial judge denied Oklahoma a jury trial and that judge erroneously determined the facts, in important instances sharply disputed between the parties.

ARGUMENT

I.

Magnolia Failed and Refused To Meet the Exculpatory Terms of the Contracts. Hence Such Exculpatory Terms of the Contracts Do Not Absolve Magnolia from Liability To Oklahoma for the Excess Costs Sustained by Oklahoma by Reason of Such Failure and Refusal of Magnolia. Oklahoma's Right To a Jury Trial Was Absolute.

Oklahoma strenuously insists, and the record evidence supports such insistence, that Magnolia failed and refused to furnish pipe "as needed" by Oklahoma for the construction of parts of this pipe line, NOT BECAUSE MAGNOLIA HAD NOT RECEIVED DELIVERY OF THE PIPE FROM ITS SUPPLIER but because Magnolia diverted 40 miles of the needed pipe, delivered to it by one of its two suppliers, to another pipe line company and because Magnolia improperly apportioned pipe delivered by its pipe suppliers, among the several sections of the pipe line—both to serve ends and objects of Magnolia wholly foreign, and without due regard, to its contract obligations to Oklahoma to furnish pipe as needed by Oklahoma.

The facts in this respect are certainly for determination in a Federal court by a jury—and not by a judge unless there be mutual consent thereto.

The exculpatory terms of the contracts have not been quoted by Magnolia's counsel in their brief but the same are quoted on page 4 of the petition and the applicable terms of the specifications are quoted on pages 4 to 6 inclusive of said petition. These provisions of both the contracts and specifications will be found in the record on the pages cited in the petition.

These exculpatory terms of the contracts do not come into operation to excuse Magnolia from causing delay or work stoppage unless:

> "• • • DUE TO FAILURE OF PIPE SUPPLIER TO DELIVER PIPE TO COMPANY ACCORDING TO PRESENT SCHEDULE OF DELIVERY OR IF COMPANY IS UNABLE TO FURNISH THE MATERIAL AS NEEDED FOR ANY OTHER REASON BEYOND ITS CONTROL."

Oklahoma asserts, without fear of successful contradiction, that the delay and work stoppage caused it were the result of Magnolia diverting 40 miles of the same size and kind of pipe to the Humble Pipe Line Company and also because Magnolia delivered pipe largely in excess of current needs of the contractors on Sections 2 and 3 of the pipe line, so as to insure its completion before December 31, 1947, for its own convenience and purposes, without the knowledge or consent of Oklahoma, and did not allocate or furnish a part of this pipe to Oklahoma as said company needed it on Sections 4, 5 and 6 of the pipe line.

The receipt can not be denied by Magnolia of 40 miles of this pipe shipped to it in care of Mayes Bros. Houston, Texas, and diverted, sold, or loaned by Magnolia to the Humble Pipe Line Company in August and September 1947, at the identical time Magnolia's representatives testified they had done everything possible to locate pipe for the continuation of work on this pipe line. The newly discovered evidence, in the form of affidavits and shipping documents, which are here (R. 1029-1030, 1032-1034B), admits of no successful denial.

Not having produced such documents and explanations in the trial, in response to the demand of counsel for Oklahoma for all of the pipe delivery orders and shipping records, and their existence having been later discovered by Oklahoma, counsel for Magnolia now state that after

they received notice of copies of such documents having been filed in the Court of Appeals below, they wrote a letter to the clerk of that court wherein they categorically denied the same and requested advice as to whether the said Court wanted a reply denying "such false charges"; that the clerk advised Magnolia's counsel the letter was being referred to Judge Russell of that court; and that said counsel received no further reply (P. 9).

This is the first information counsel for Oklahoma has received that even such a letter was written to the clerk as now claimed by counsel for Magnolia. No copy of such letter was sent to Oklahoma's counsel. Certainly no copy of a formal reply, in accordance with rules of court procedure, was received by counsel for Oklahoma. Counsel for Magnolia are most able and experienced lawyers. They knew how to answer such a motion as that filed by counsel for Oklahoma in the Court of Appeals, supported by the affidavits and documents now here showing the existence of the newly discovered and most material evidence.

We understand that Counsel for Magnolia now deny on the record (Brief, p. 9) that there was any delivery of pipe consigned by the Youngstown Sheet and Tube Company to Magnolia Pipe Line Company c/o Mayes Bros., Houston, Texas, which had stenciled on it "Magnolia Pipe Line Company, c/o J. E. McGeath" (R. 1029), or that said pipe was redelivered to, or laid in the Humble Pipe Line Company's pipeline in August and September 1947.

This denial in itself, constitutes a jury issue, as well as do all of the facts and circumstances connected therewith.

Magnolia's counsel know full well that they did not produce this record of the concealed transaction concerning the purchase of the 40 miles of pipe and its subse-

quent delivery by Magnolia, or release by Magnolia to the Humble Pipe Line Company. As is stated in the petition, and repeated here for emphasis, counsel for Oklahoma did not know of the existence of these documents or transactions until shortly before the motion and the supporting affidavits and documents, were presented to the Court of Appeals. We do not understand why under such circumstances counsel for Magnolia have seen fit to cite to this court the case of *Purcell* v. *Miner*, 4 Wall. 519.521, (p. 10) in this connection with no attempt whatever to distinguish the cases in this Court and elsewhere, cited in the petition, unless it be a studied effort on their part to minimize the importance thereof. If so, it should certainly fail.

The Court will note that these counsel for Magnolia have seen fit in their brief to completely ignore that part of the petition insisting that Magnolia had failed to furnish pipe as needed by Oklahoma on Sections 4, 5 and 6 of the line because Magnolia delivered to the contractors on Sections 2 and 3 of the line sufficient pipe to completely construct each of the two sections notwithstanding the contractors would not need the same for literally months after it was delivered and at a time when Oklahoma could not lay a single foot of pipe because Magnolia had furnished the pipe, delivered by the pipe suppliers, to Sections 2 and 3 of the pipe line largely in excess of any current or immediate needs of the contractors at work on said sections.

This Court will note that counsel for Magnolia make no attempt in their brief to deny that the reason Magnolia delivered pipe to sections 2 and 3 of the pipe line, as it was delivered to Magnolia by the pipe suppliers, was because Magnolia decided after the construction of the line had commenced to complete that part of the pipe line from Corsicana, Texas, to Conway, Arkansas, (this being Section 1 completed August 15, 1947, by Oklahoma

and Sections 2 and 3 being constructed by other contractors) so that Magnolia's stockholders could receive a larger dividend for 1947, based on the completion and use of these three sections of pipe line.

The characterization of such a statement in the petition—based on record evidence (R. 229, 691-692)—as "a fallacious statement is utterly ridiculous and ludicrous and would be a greater trick than ever performed by Houdini during his lifetime",[2] is not an argument at all. If the Court believes that such language on the part of members of its Bar is improper, the Court will know how to deal with the offenders.

In any event, the issue is for a jury to determine whether the pipe deliveries by the pipe supplier to Magnolia were in good faith delivered by Magnolia to sections 2 and 3 of the pipe line, largely, and for months, in excess of the current needs of such contractors, while by reason thereof Oklahoma had to stop work on Sections 4, 5 and 6 for failure of Magnolia to furnish pipe as needed by Oklahoma for continuation of construction.

If the case had been submitted to a jury, and if the jury had determined that the 40 miles of pipe had been sold, conveyed, loaned, or otherwise delivered by Magnolia in August and September 1947 to the Humble Pipe Line Company, or if the jury had determined that the delivery of pipe on Sections 2 and 3, largely in excess of the needs of the contractors on said Sections for months in advance, was not in good faith, but for the purpose of securing increased dividends for the stockholders of Magnolia, then it may be assumed that no legal mind could argue that Magnolia would receive exculpation for the resulting delays under paragraph 4 of the contracts and the applicable terms of the specifications quoted in the petition. (Pp. 4-6).

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[2] In the same category is their statement on page 2 of their brief (Infra, p. 18).

We think there is now in the record ample evidence, from which a jury could have properly found and determined: (1) That the delays and work stoppage by Oklahoma were not beyond the control of Magnolia, that is, not within the exculpatory terms of the contracts, when instead of delivering the 40 miles of the identical pipe needed by Oklahoma to continue construction operations,[3] Magnolia permitted the same to be obtained from it by the Humble Pipe Line Company for use in its pipe line; and (2) That, similarly, Magnolia acted in bad faith in causing Oklahoma to delay and finally stop its work for lack of pipe, while sufficient pipe to permit such continuance of the work by Oklahoma had been delivered by Magnolia to Sections 2 and 3 of the pipe line largely in excess of the current or reasonably current needs of the contractors on the said respective sections, and, as hereinafter shown (Infra, pp. 12-13), was not used for literally months after the same had been so delivered by Magnolia. It was, and is, the exclusive function of a jury to determine whether that action on the part of Magnolia was stupid, arbitrary, or motivated by greed of the management of Magnolia to obtain increased dividends for the stockholders by placing this line in operation to Conway, Arkansas, before December 31, 1947.

The denial of a written demand for a jury trial in such an instance is both arbitrary and capricious and constitutes a denial of due process of law and the denial of a jury trial in violation of both the Fifth and Sixth Amendments to the Constitution of the United States.

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[3] Whether this 40 miles of pipe was a part of, or in addition to the 369 miles of pipe ordered by Magnolia to be manufactured by Youngstown (R. 923) is wholly immaterial. That pipe was delivered to Magnolia when Oklahoma needed pipe. (R. 310).

II

It Is Wholly Beside the Point for Magnolia's Counsel To State in Their Brief that Oklahoma "Should Have No Claim for Damages for Delays or Work Stoppage Due To Failure of Supplier To Deliver Pipe To Respondent According To Schedule of Delivery Contained in the Contract" (p. 2).

In the first place, this is not one of the issues in this case. In the second place it is not now claimed, and has never been claimed, that, under the exculpatory terms of these contracts, Magnolia was liable in damages for any failure of Magnolia to furnish pipe when needed by Oklahoma IF SUCH FAILURE TO FURNISH NEEDED PIPE WAS DUE TO THE FAILURE OF MAGNOLIA TO RECEIVE DELIVERIES FROM ITS PIPE SUPPLIERS IN EVENT THE SHIPPING ORDERS WERE SEASONABLY GIVEN BY MAGNOLIA FOR THE PIPE. This is a very dead "Red Herring" which counsel for Magnolia has dragged into this case, which served to confuse the lower courts as to the issues, and which Magnolia's counsel apparently hope to use here for the same purpose! If there had been a jury trial, we are quite certain that this effort would have been wholly unsuccessful in the first instance.

Oklahoma insisted in the trial court and in the Court of Appeals that the delays and work stoppages of said company resulted because:

MAGNOLIA USED A VERY LARGE QUANTITY OF PIPE DELIVERED BY THE PIPE SUPPLIERS TO MAGNOLIA IN THE EARLIER STAGES OF THE CONSTRUCTION OF THIS PIPE LINE TO EXTEND FROM CORSICANA, TEXAS, TO PATOKA, ILLINOIS, A DISTANCE OF 650 MILES, TO DELIVER PIPE TO SECTIONS 2 AND 3 OF THE PIPE LINE, LARGELY IN EXCESS OF ANY CURRENT OR REASONABLY IMMEDIATE NEEDS OF THE CONTRAC-

TORS WORKING ON SAID SECTIONS 2 AND 3: THAT SUCH PIPE DELIVERED TO SECTIONS 2 AND 3 WAS SUFFICIENT TO COMPLETE THE CONSTRUCTION OF SAID SECTIONS; THAT SECTIONS 2 AND 3 WERE NOT COMPLETED UNTIL NEAR THE MIDDLE OF DECEMBER 1947; THAT FOR MONTHS PIPE IN EXCESS OF THE NEEDS OF THE CONTRACTORS ON SAID SECTIONS 2 AND 3 WAS NOT USED OR NEEDED BY SAID CONTRACTORS; AND THAT MAGNOLIA REFUSED TO FURNISH, OR CAUSE TO BE FURNISHED, ANY OF THE UNUSED AND UNNEEDED PIPE ON SECTIONS 2 AND 3 TO MEET THE NEEDS OF OKLAHOMA ON SECTIONS 4, 5 AND 6 OF THE PIPE LINE, WITHOUT WHICH OKLAHOMA'S WORK HAD TO STOP.

In other words, Oklahoma asserted, in effect, that the delay and work stoppage encountered by it for lack of needed pipe were not due to any failure of the pipe suppliers of Magnolia to deliver pipe to it, but was due to maladministration by Magnolia in not distributing the pipe delivered to it by its pipe suppliers to the several sections of the pipe line as pipe was needed by the respective contractors to enable them to complete their work, or get as much of it completed as possible, before the wet, freezing, and muddy weather, along the construction route, was due to appear in the winter of 1947-1948 and spring of 1948. Also, Oklahoma insisted that the action in this respect by Magnolia in delivering all of the pipe to Sections 2 and 3, sufficient to complete said sections (Section 1 having been previously constructed), was the concealed purpose and intent of the management of Magnolia to get into operation by December 31, 1947, the segment of the pipe line from Corsicana, Texas, to Conway, Arkansas, so that it could be placed in operation —delivering to tank cars at Conway—and dividends paid to the stockholders for 1947, based on the value of such operating segment under a certain consent decree referred to in the petition (pp. 9-10).

A further failure of Magnolia to deliver to Oklahoma as needed pipe it had received from its pipe supplier was discovered by Oklahoma after the case had been tried and after the Court of Appeals had filed its opinion affirming the trial court but while a motion for rehearing was pending in the Court of Appeals. This new evidence was promptly brought to the attention of the Court of Appeals, as a supplement to the pending motion for rehearing, and is the evidence as to the concealment and diversion of the 40 miles of identical pipe in August and September 1947 which is now before this Court (R. 1029-1030, 1032-1034B) and emphatically denied in the brief for Magnolia.

This transaction between Magnolia and the Humble Pipe Line Company could, and would have been explored and the evidence placed before the trial court at the time of the trial had Magnolia's counsel furnished, in response to the demand of Oklahoma's counsel, all of the papers concerning the contracts, orders for delivery, and shipments of pipe for this pipe line or any pipe suitable for this pipe line.

Regardless of any discourteous statements by Magnolia's counsel, we do not intend to be diverted in placing the issues of this case squarely before this Court.

Under the terms of the contracts and specifications, quoted in the petition (Pp. 4-5), Magnolia was to furnish the pipe as "needed" by the contractors for construction of the line or their respective sections thereof. Where, or how, or from whom Magnolia purchased, or otherwise obtained, the pipe was of no concern to Oklahoma. The contracts with Oklahoma made no reference to the amounts of pipe to be delivered by the pipe suppliers or their identity.

It was the legal responsibility of Magnolia to furnish to the contractors as they "needed" the same for construction purposes the pipe as delivered by the suppliers to Magnolia. Under paragraph 4 of the contract

(Petition, p. 4) Magnolia was not to be responsible in damages to any contractor when the pipe was not furnished by Magnolia due to failure of the pipe supplier to deliver the pipe to Magnolia or "for any other reason beyond its control." Magnolia had no right to responsibility to deliver pipe largely in excess of the needs of the contractors, to the extent of 100 miles or more (R. 873-886, 242-244), at a time when another contractor on the pipe line was in need of pipe to continue operations. But that is what Magnolia did do!

Obviously, there was no failure of the pipe supplier to deliver the 40 miles of pipe to Magnolia which it permitted the Humble Pipe Line Company to secure; that is, which Magnolia in turn delivered to Humble.

It is equally obvious that there was no failure of the pipe supplier to deliver the pipe which Magnolia saw fit to deliver sufficient to complete Sections 2 and 3 of the pipe line, to give Magnolia a segment of line from Corsicana to Conway, to be placed in operation before December 31, 1947,—quantities of pipe so largely in excess of any current needs of the contractors on said sections from June or July 1947 that it was not all installed until about the middle of December 31, 1947, and which one of the contractors would not have had installed by that date if a part of this section had not been let to another contractor to assist in completing the same!

Specifically, what actually happened in the furnishing of pipe by Magnolia was ignored in the trial court's findings of fact (R. 468-470) but is established by the record: Magnolia, by July 27, 1947, had completely delivered the 107.5 miles of pipe for Section 2 (R. 874); in fact, all but 15.75 miles of this pipe had been delivered during the interim between May 25, 1947 and July 19, 1947 (R. 873). Yet, this contractor for Section 2 DID NOT COMPLETE THE INSTALLATION OF THE ENTIRE SECTION 2 OF 107.5 MILES UNTIL DECEMBER 12, 1947 (R. 878). Thus for much of the entire period—from

about May 25, 1947 to shortly before December 12, 1947 —there was on Section 2 of the pipe line amounts of pipe largely in excess of any current or immediate need of that contractor.

Also, Magnolia delivered all of the pipe for Section 3 of the line, 113 miles in length, by July 22, 1947 (R. 880); in fact, all but 14 miles of this pipe had been delivered by Magnolia by July 16, 1947 (R. 879). Yet this contractor DID NOT COMPLETE THE INSTALLATION FOR THE ENTIRE SECTION 3 OF 113 MILES UNTIL DECEMBER 13, 1947 (R. 886) AND THIS WAS MADE POSSIBLE ONLY BY THE FACT THAT ANOTHER CONTRACTOR WAS BROUGHT IN BY MAGNOLIA TO ASSIST IN THE COMPLETION (R. 847-851, 386-387, Footnote 2, petition, p. 11). Thus, for much of the period from July 16th to December 13th there was on this Section 3 of the pipe line quantities of pipe largely in excess of the current or immediate needs of the contractor for installation.

During these long periods, while pipe so largely in excess of any needs of the contractors for Sections 2 and 3 of the pipe line had been furnished by Magnolia, and not only was unused, but was not used for months later, Oklahoma was delayed and finally had to stop work for lack of needed pipe. While some of the pipe had been delivered to Section 4 by August 15th, or approximately the time the diversion of the 40 miles of pipe to Humble commenced, the balance of 16 miles of pipe to complete Section 4 was not delivered until October 15, 1947 (R. 887-891). Certainly there was enough pipe in excess of the needs of the contractors on Section 2 and 3 of the pipe line to have provided 16 miles of pipe to permit of the completion of Section 4 of the pipe line. A part of the 40 miles of pipe which went to Humble could have been used to complete this section.

Magnolia's evidence shows that no pipe whatever was furnished by it for use on Section 5 of the line, consisting

of some 118.25 miles, until October 27, 1947 and by November 20, 1947, but a total of 50.85 miles of pipe had been furnished for this section (R. 893). The balance of the pipe for Section 5 was not furnished until January 5, 1948 to March 14, 1948 (R. 895). Certainly if Magnolia had furnished Oklahoma in August and September 1947, the 40 miles of pipe which was delivered by Youngstown Sheet & Tube Company to Magnolia, that pipe plus what was furnished in October and November 1947 would have just about completed Section 5 and the small balance could have been obtained from the pipe furnished in excess of current needs on Sections 2 and 3 of the pipe line.

This same Magnolia evidence, produced upon demand of Oklahoma's counsel (R. 661-663, 351-353), shows that no pipe whatever was furnished by Magnolia for Section 6, which was 124.4 miles in length, until December 1947, and but 42.5 miles had been furnished by December 17, 1947 (R. 899). The balance was not completed until March 4, 1948 (R. 901).

Thus during the late summer and autumn seasons, excellent periods of the year for pipe line construction, Oklahoma was delayed and stopped from work for much of the time because Magnolia did not furnish pipe to Oklahoma as needed for construction. The failure of Magnolia was not because the pipe supplier had failed to make deliveries of pipe to Magnolia, certainly not in its entirety. The failure of Magnolia to make substantial deliveries of pipe to Oklahoma as needed for installation in Sections 4, 5 and 6 of the pipe line was due, as we have repeatedly stated, too repeatedly, perhaps, to the fact that Magnolia furnished pipe to Sections 2 and 3 of the pipe line largely in excess of the current, or reasonable future, needs of the two contractors thereon and had made some sort of deal whereby the 40 miles of pipe delivered by the Youngstown Sheet and Tube Company in August and September 1947, to Magnolia was redelivered to the Humble Pipe Line Company.

A jury could have concluded that such action on the part of Magnolia greatly delayed Oklahoma, forced it to perform a large part of its work in the worst seasons of the year (winter of 1947-1948 and spring of 1948); that a considerable part, if not all, of such delay and excess costs was due to the action of Magnolia; and that Oklahoma was entitled to judgment for a considerable part, if not all, of the excess costs sustained by it.[4]

(a)

THERE WAS NO ALLOCATION BY THE CONTRACTS BETWEEN THE PARTIES OF THE PIPE DELIVERED BY THE PIPE SUPPLIERS TO ANY PARTICULAR SECTION OF THE PIPE LINE. MAGNOLIA HAD THE POWER, DUTY AND RESPONSIBILITY OF EQUITABLY DISTRIBUTING THE PIPE DELIVERED BY ITS PIPE SUPPLIERS AMONG THE SEVERAL SECTIONS OF THE PIPE LINE AS NEEDED BY THE RESPECTIVE CONTRACTORS.

Mr. Latimer, President of Magnolia, testified at pages 318 and 319 of the record on this point as follows:

> "Q. • • • Was there any kind of a signed instrument, a contract, or letter or anything else, stating that when pipe comes in, according to any kind of a delivery schedule, "We will deliver this pipe to a particular section and that pipe belongs to that particular section exclusively, and no other section. Is there anything like that in there (Referring to the contract)?
>
> "A. No, sir.
>
> "Q. Is there anything in the contract that says when that pipe comes from the mills and is delivered from the supplier to Magnolia at the railheads that

[4] See petition, page 3, footnote, for agreement made at time Oklahoma reduced bid prices and agreed to take contracts for Sections 4, 5, and 6 of the pipe line. This agreement by Magnolia was breached.

Magnolia will assign it to a contractor and that pipe becomes in the exclusive possession of that contractor until he uses it; is there anything like that?

"A. I don't recall it being in the contract."

Mr. True, Vice President & General Manager of Magnolia, testified on the point as follows:

"A. This schedule indicates overall the tentative promise from these jobbers as to when they would ship this pipe. We indicated as to which section it would be shipped to, according to the way it arrived; in other words, so many miles to Section 1, next number of miles to Section 2, next number 3, and then 4 and on down the line.

"Q. And it was strictly an arrangement between Magnolia and the pipe suppliers?

"A. Right." (R. 258).

"Q. Mr. True, is there ever a time on that pipe line from the time the first carload of pipe gets to the railhead, that you haven't full and complete control over the pipe?

"A. The pipe stays in ownership—it is still with Magnolia.

"Q. It is still your pipe and it is at all times while it is on the pipe line?

"A. Yes, sir.

"Q. And if you want to pick up some pipe and move that pipe from one section to the other, that comes under your business, doesn't it?

"A. It is a matter for you to determine, whether it can be done or not." (R. 264)

We have quoted in the petition (pp. 5-6) the applicable terms of the specifications as to the Schedule of Deliveries by the pipe suppliers to Magnolia and this is referred to in said specifications as the "present" schedule of deliveries. The contract obligation in paragraph 4 of the contracts was on Magnolia to furnish the pipe as "needed" by the contractors and this obligation must be read in connection with the further terms of the contracts fixing the time for the completion by the contractors of each section of the pipe line. The Court will

note that the contract requirement for each section was that it be completed within 150 calendar days from commencement of work. (Petition, p. 5).

We find nothing whatever in the contracts which contradicts the above testimony of President Latimer of Magnolia or the testimony of Mr. True, its vice president and general manager.

The reasonable and proper construction of the contract documents is that if a mistake was made by Magnolia in furnishing pipe to any section of the pipe line, greatly in excess of any current or immediate need of the contractor for some weeks or months in advance and a need developed on the part of a contractor on some other section of the line which was not met from any current deliveries by the pipe suppliers to Magnolia, then it was the duty of Magnolia to take some pipe from the contractor who had an excess amount of pipe and furnish it to the contractor who had need of more pipe in order to continue operations.

It is not understood how the Courts below could have concluded that once the pipe was furnished by Magnolia to one or more sections of the same pipe line, largely in excess of any present or reasonably immediate future need of the contractor, nevertheless that pipe had to remain on the section or sections to which furnished and that a contractor for another section of the same line, to whom pipe was furnished in insufficient quantities or not at all, had to stop work for lack of pipe. Yet that is what the lower courts did do on the insistence of Magnolia's counsel.

(b)

THERE WAS NO "FLAGRANT AND TYPICAL MISREPRESENTATION ON PAGE 2 OF THE PETITION" AS STATED BY COUNSEL FOR MAGNOLIA.[5]

Some of the evidence is in the record, at the pages cited by Magnolia's counsel. The Court is invited to read the same. It is in the most general terms. The "corrected" agreements, or orders, for the pipe, addressed to two pipe suppliers, are also in the record (R. 923-928). They provided that shipping instructions would be given later. The shipping instructions, in summarized form, a great many in number, are also in the record (R. 929-971). The Court will read this testimony in vain if there is any undertaking to determine any reference to any specific shipping instruction, or order for shipment. By supplying the date of the order, the date shipment was required, etc., one might conclude that a small part of the testimony has to do with delay of the National Tube Company in making shipment of 18 miles of pipe to Section 4 of the pipe line and there is scant reference to a possible shipping order for pipe to Section 5 of the line. (R. 323). This was the testimony of a manager of sales whose office was in Dallas, Texas, concerning events in the plant of the National Tube Company in Pittsburgh, Pa. by which he was employed. This was obviously hearsay testimony and the court struck out some of his testimony for that reason (R. 332).

On the other hand, it was admitted that Youngstown Sheet & Tube Company not only made its deliveries on time but actually made some of them ahead of schedule. (R. 236). Why one of the two tube companies, in the same general section of the country, could, and did comply with

[5] See post (p. 7) for our objection to such statements.

its contract in making deliveries on schedule, while the other one is alleged to have failed to do so was not even mentioned by Magnolia's witnesses, so far as we know. In view of the character of the testimony on this point by the witnesses cited in Magnolia's brief, a jury might well have found that Magnolia did not place its shipping orders with the National Tube Company in time for that company to have made the shipments at earlier dates. Most certainly the jury could have found the refusal was arbitrary and capricious of Magnolia in not transferring and furnishing to Oklahoma the pipe Magnolia had previously furnished to the contractors on Sections 2 and 3 of the pipe line largely in excess of the current, or reasonably immediate future, needs of these two contractors.

But the trial court refused to permit a jury to try the case. The findings of fact of the trial court were arbitrary, capricious, and contrary to the evidence in not finding that at least some part of the long delay and stoppages of work by Oklahoma resulted because Magnolia did not furnish pipe to Oklahoma when needed from the several shipments of pipe which Magnolia received and which it had furnished on Sections 2 and 3 largely in excess of the needs of the contractors on said sections.

III

The Contract Cases Cited By Counsel for Magnolia at Pages 10 to 12 of Their Brief Are Not in Point.

In the first place, these cases arose under contracts with the United States Government, tried in the United States Court of Claims, and no jury may be had in the trial of such cases. Here the Sixth Amendment guarantees a trial by jury in a Federal district court in litigation between two private parties where the amount involved exceeds $20.00—which is certainly the situation in

this matter. Also, due process of law, as provided in the Fifth Amendment, requires such a jury when demanded by either party to the litigation.

In the second place, there is no similarity between the facts and contract exculpatory provisions involved in this case and the facts and contract provisions in the *Wells Brothers, Crook Company, Wood, Rice,* and *Foley cases* cited by Magnolia's counsel. These citations by Magnolia's counsel are to the opinions and judgments rendered by this Court, the Court is entirely familiar therewith, and the time of the Court will not be wasted by Oklahoma's counsel on any detailed analysis of such cases for the purpose of showing that they have no application whatever to this petition.

We do not dispute the present right and capacity of either the Federal government and its contractors, or the right and capacity of Magnolia and Oklahoma to stipulate in their respective contracts that either party may not be responsible in damages for any delays or stoppages of work caused the other party. *We simply say, as previously stated in the petition and elsewhere herein, that Paragraph 4 of the contracts and the corresponding terms of the specifications in this case made only a conditional exculpation of Magnolia from damages for delays or work stoppages that Magnolia might cause Oklahoma to encounter and that such conditions precedent were not met by Magnolia.*

The facts being disputed as to the causes of the delays and work stoppages, the issue was one for a jury to determine.

If the quotation on page 12 of Magnolia's brief from the *Wells Bros.* case was ever true, as between the Federal Government and its contractors, it is even more so as to *both Magnolia and Oklahoma* in this case. These parties were most careful as to the language used in Paragraph 4, the exculpatory provisions, of these three

contracts in suit. *Magnolia was not relieved of damages for any or all delays and work stoppages it might cause Oklahoma* but only:

> "* * * FOR DELAY OR WORK STOPPAGE DUE TO FAILURES OF PIPE SUPPLIER TO DELIVER PIPE TO COMPANY ACCORDING TO THE PRESENT SCHEDULE OF DELIVERY OR IF COMPANY IS UNABLE TO FURNISH THE MATERIALS AS NEEDED FOR ANY OTHER REASON BEYOND ITS CONTROL. (P. 4 of petition).

Magnolia's own evidence shows the respective dates of furnishing by it of pipe to each of the five sections of the pipe line, from Section 2 to Section 6, inclusive, and the rates of progress of the contractors on the respective sections of the line. (R. 887-904). It simply can not be disputed therefrom that very early after the contracts were entered into, large quantities of pipe was furnished on Sections 2 and 3 of the pipe line, sufficient to complete the same, and greatly in excess of any need of the contractors on such sections, from day to day, week to week, or month to month. Correspondingly, this evidence also shows the long delays in furnishing pipe to meet the needs of Oklahoma on Sections 4 to 6 of the pipe line. This evidence makes no showing whatever with respect to the 40 miles of pipe which Magnolia redelivered to Humble Pipe Line Company because Magnolia did not furnish the record of this transaction, and Oklahoma had no knowledge thereof at the time of the trial.

A jury might well have found from such evidence and other evidence in the record that Magnolia was not prevented from furnishing pipe as needed by Oklahoma because of any failure of the pipe suppliers to deliver pipe to Magnolia, at least as to some part or all of the periods of delay and work stoppages. Had the jury so found, of course as to such period or periods Magnolia could have obtained no relief under the said paragraph 4 of the contract and the specifications.

CONCLUSION

Counsel for Oklahoma insist that Magnolia's counsel have shown no substantial reasons why the petition should not be allowed or why there would not be well served thereby the due and proper administration of justice in the Federal courts as well as other public interests.

Respectfully submitted,

O. R. McGuire
William S. Campbell.